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No. 78-357

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

ROBERT R. WILLIAMS, et al.,

Appellants,

v.

LEILA G. BROWN, et al.,

Appellees.

On Appeal from the United States Court of Appeals for the Fifth Circuit

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Alabama, reported at 428 F. Supp. 1123, appears at pages 5a-51a of the joint appendix (J.A.). The opinion of the United States Court of Appeals for the Fifth Circuit, which is unreported, appears at pages 1a-2a of the joint appendix.

JURISDICTION

The judgment of the court of appeals, affirming a judgment of the district court in appellees' favor, was

entered on June 2, 1978. (J.A. 3a.) A notice of appeal was filed in the court of appeals on August 18, 1978. A jurisdictional statement was filed in this Court on August 30, 1978, and probable jurisdiction was noted on October 30, 1978. This Court has jurisdiction under 28 U.S.C. § 1254(2).

QUESTIONS PRESENTED

Since at least 1836 the members of the governing body of the Mobile County, Alabama, public schools have been elected by the voters of the County at large. The current state statute providing for the at-large election of the five members of the Board of School Commissioners of Mobile County was enacted in 1919, at a time when black residents of Mobile County and Alabama generally were effectively disfranchised. Not quite 35 percent of the residents of the County are black and, though there are no longer legal or extra-legal impediments to blacks' voting or otherwise engaging in the local political process, no black has been elected to the Mobile County school board in an at-large election. The questions presented are:

1. Whether criteria devised by the court of appeals, whose purported satisfaction was the basis of the judgment below that the at-large election of Mobile County school commissioners denies black citizens the equal protection of the laws in violation of the Fourteenth Amendment and denies or abridges their right to vote in violation of the Fifteenth Amendment, reflect a correct construction of those constitutional provisions, particularly insofar as governing decisions of this Court hold that state action violates them only if it is purposefully discriminatory.

2. Whether, assuming the applicability of the court of appeals' criteria in determining the constitutionality of Mobile County's system of electing its school commissioners, the courts below properly concluded that those criteria were satisfied.

3. Whether, under a proper construction of the equal protection clause of the Fourteenth Amendment and of the Fifteenth Amendment as applied to the Mobile County school board, a local municipal body, the courts below could properly have found on the record before them that the election of school commissioners by the residents of the County at large violates the Constitution when (a) there is a strong and consistent policy, racially neutral in its origin, favoring at-large elections and (b) the failure of blacks to win election to the school board proportional to their numbers is not the result of any legal or extra-legal impediments to their participation in the political process.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "SECTION 1. . . . [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

The Fifteenth Amendment to the United States Constitution provides in pertinent part:

> "SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged . . . by any State on account of race, color, or previous condition of servitude."

Act No. 229 of the Local Acts of Alabama, 1919, provides in pertinent part:

> "SECTION 4. [I]n every second year . . . at the general election in that year, there shall be elected by the people successors to the members of the Class [of members of the Board of School Commissioners of Mobile County] whose term of office is then expiring. The term of office of the Commissioners elected by the people at the general elections under this Act, shall be six years."[1]

STATEMENT

The members of the governing body of the Mobile County, Alabama, public schools have been elected on an at-large basis since at least 1836. The original predecessor to the present Mobile County Board of School Commissioners was created by an act of the Alabama legislature in 1826, seven years after Alabama became a state. Acts of Alabama, 1825-26, p. 35 (J.A. 130a).[2] A later act of the Alabama legislature in 1836 expressly provided that the members of this governing body would be elected on an at-large basis by the voters of Mobile County. Acts of Alabama, 1836, p. 48 (*Id.*). Since then, the Alabama legislature has made a number of changes in the composition and responsibilities of this governing body of the

[1] The full text of Act No. 229 is included as an addendum to this brief.

[2] Citations for factual propositions are principally to the opinions of the district court and of the court of appeals, which are reproduced in the joint appendix at pages 5a-51a and 1a-2a, respectively. Other citations are to other materials included in the joint appendix in this Court (J.A.), the joint appendix below (R.) and the transcript of the trial (Tr.).

Mobile County public schools. However, during all that time and notwithstanding all of those changes, the governing state statute has provided for the at-large election of the school commissioners. Until the partial implementation of the district court's order in this case, the school commissioners have, without interruption, been elected by the voters of Mobile County on an at-large basis. (J.A. 20a, 130a-32a.)

The Complaint

The complaint in this case challenged the constitutionality of Alabama's commitment for over 140 years to the at-large election of members of the Mobile County school board. The original complaint was filed June 9, 1975, on behalf of Leila G. Brown and other black citizens of Mobile County. (J.A. 75a.) The complaint claimed that "[t]he present system of electing members of the Board of School Commissioners of Mobile County discriminates against black residents of Mobile and Prichard in that their concentrated strength is diluted and minimized by the larger white majority in other parts of the county." (J.A. 78a.) Plaintiffs requested that the court "[g]rant plaintiffs and the class they represent a declaratory judgment that the election system complained of herein violate[s] the First, Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States and 42 U.S.C. §§ 1973, 1983 and 1985(3)." (J.A. 79a.)[3] The

[3] The district court by order dated January 17, 1976, certified that the plaintiffs could maintain the action as a class action, with the class consisting of "all black persons who are now citizens of Mobile County, Alabama." (J.A. 87a.) At that time the school commissioners were not defendants in the lawsuit, having been dismissed by an order of the district court dated November 21, 1975, after the Alabama legislature in the summer of 1975 passed an act providing for the election of school commissioners from single-member districts. (J.A. 80a.) However, in a subsequent Alabama state court action, that 1975

(footnote continued)

court was also requested to "[o]rder the reapportionment of the . . . Board of School Commissioners of Mobile County so that the voting strength of black citizens is not diluted, minimized or canceled out." (J.A. 79a.)[4]

Plaintiffs' challenge to the at-large manner of electing school board members was premised on the alleged effects of this system of election, not on its purpose. This focus was evident in plaintiffs' complaint, in an amended complaint (J.A. 90a), and in plaintiffs' contributions to a joint pretrial document setting forth the factual and legal claims of the parties (J.A. 125a-28a, 137-39a). No claim was made by plaintiffs in these documents that the at-large election system was created or was being maintained for the purpose of discriminating against black citizens.

The Defense

The school board took the position that the mere effects of the at-large manner of election, if any, in diluting black voting strength were not sufficient to make out a violation of relevant constitutional provisions. As reflected in its contributions to the parties' joint pretrial document, the school board defended the lawsuit on the ground,

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(footnote continued)
act was declared defective because of the manner in which the notice was published (J.A. 23a), and the board and its members were added as parties defendant by an order of the district court dated March 8, 1976 (R. 63).

[4] The complaint also named as defendants members of the Mobile County Commission and made allegations and requests for relief with respect to the at-large manner of electing Mobile County commissioners similar to those made with respect to the Mobile County school board. (J.A. 75a-79a.) This case was tried as one, but the district court rendered a separate opinion in the Board of School Commissioners portion of the case. (J.A. 6a n.1.) The County Commissioners portion of the case was resolved by later opinion and order of the district court dated March 2, 1977, and is not involved in this appeal.

among others, that "the present system of election was not adopted with a racially discriminatory purpose" (J.A. 133a) and that in the light of this Court's decision in *Washington* v. *Davis,* 426 U.S. 229 (1976), the at-large system of elections for school board members could not be held unconstitutional unless it "first be proven that the statute providing for the present system, when enacted, was enacted for a racially discriminatory purpose" (J.A. 136a).

The Factual Record

The trial before the district court, sitting without a jury, lasted seven days. The record showed the following:

Mobile County is in the southwest portion of Alabama, bordering on the Gulf of Mexico to the south and the State of Mississippi to the west. (J.A. 9a.) In 1970 the County had a population of 317,308 in its 1,240 square miles, of whom approximately 32.5 percent were black. (*Id.*) The City of Mobile, the largest city in the County, had a 1970 population of 190,026, with a slightly higher percentage of black residents—35.4—than the County as a whole. (*Id.*) The next largest city in Mobile County is Prichard, which by 1972 had a black majority population. (J.A. 9a, 259a.)

As stated above, the members of the governing body of the Mobile public schools have been elected at large for perhaps a century and a half. In 1826 the Alabama legislature established "The Mobile School Commissioners" to operate the first public school system in Alabama. This original act set the number of commissioners at from 13 to 25 and provided for terms of five years, to coincide with the terms of the representatives to the General Assembly of Alabama. Acts of Alabama, 1825-26, pp. 35-36.

In 1836 the Alabama legislature fixed the number of Mobile School Commissioners at 13 and reduced their term from five to three years. Acts of Alabama, 1836, p. 48. This 1836 Act also specifically provided for the election of all commissioners from the County at large by all the voters of the County, thus making explicit the manner of election of these commissioners that the district court found implicit in the 1826 Act.[5]

There has been no change in the at-large manner of electing the Mobile school commissioners since 1836, notwithstanding numerous actions by the Alabama legislature dealing with or affecting the Mobile County public school system. These actions have included (1) an 1854 Act establishing for the first time a public school system for the rest of Alabama but not substantively affecting the operations of the Mobile School Commission, Acts of Alabama, 1853-54, pp. 8, 17; (2) enactment of the Alabama Constitution of 1875, which continued recognition of the special status of the public school system in Mobile County in Section 11, Article XII, thereof; (3) an 1876 Act that reduced to six the number of Mobile County school commissioners and provided that at least two of these commissioners must reside within six miles of the County Courthouse, Acts of Alabama, 1875-76, pp. 363-64, and (4) the Alabama Constitution of 1901, which in Section 270 of Article XIV reaffirmed the special status of the Mobile public school system.

[5] There is some doubt how commissioners were to be selected under the original 1826 Act. The district court found that the 1826 Act provided for the election of the commissioners by the residents of the County at large (J.A. 20a), but the opinion of the Supreme Court of Alabama in Board of School Comm'rs v. Hahn, 246 Ala. 662, 663, 22 So.2d 91, 92 (1945), indicates that the commissioners were to be selected by the legislature. The language of the 1826 Act itself is ambiguous.

The legislation currently governing the constitution and operations of the Mobile school board was enacted in 1919. Local Acts of Alabama, 1919, p. 73. This legislation provides for five school commissioners, elected in even-numbered years for staggered six-year terms. Consistent with all previous actions by the Alabama legislature since at least 1836, the commissioners under this statute are elected at large by the County's voters.[6] In years in which two seats are up for election, candidates run for one position or the other. Elections are partisan. A state law of general applicability requires a majority vote for a party nomination, thus necessitating a runoff when no candidate obtains a majority in the initial primary vote. (J.A. 39a-40a.)

At the time that the at-large election of the governing body of the Mobile County public school system was first provided for in 1826 (or 1836) the Alabama legislature could not have been motivated by any effect this election system may have had on black voting. At this time and for many years thereafter blacks were completely removed from the political process. This point was made by Dr. Melton A. McLaurin, an associate professor of history at the University of South Alabama, who testified for plaintiffs. Dr. McLaurin testified that (1) blacks did not begin their involvement in politics in Alabama until the adoption of the Reconstruction Acts of 1867 (J.A. 194a); (2)

[6] Before the district court, plaintiffs claimed that the then-current at-large scheme was the result of either a 1933 act or a 1939 act of the Alabama legislature. Defendants asserted that the 1933 and 1939 legislative enactments were ineffective insofar as the Mobile school board is concerned because they were legislative acts of general application, and such general legislative acts cannot affect the Mobile County school system by virtue of § 270 of Art. XIV of the Constitution of 1901. (J.A. 10a.) However, the district court did not think it necessary to resolve this issue, since neither the 1933 act nor the 1939 act affected the continuing legislative judgment that Mobile County school board members should be elected at large. (J.A. 10a-11a.)

before this time, blacks were not a part of the political process in Alabama (J.A. 211a-12a); (3) before 1865 it would have been unnecessary to establish any particular method of electing Mobile County school board members to avoid black board members (J.A. 215a-16a); and (4) indeed, it would not even have occurred to the people of Mobile County during this 1826-65 period that blacks could have become members of the board (J.A. 216a, 218a).

Dr. McLaurin had a similar judgment with respect to the period from 1901, when blacks were effectively disfranchised by operation of the new Alabama constitution of that year, through at least 1944. (J.A. 195a-98a.) Dr. McLaurin specifically testified that during this period (1) blacks were essentially eliminated from participation in the political life of Mobile County and Alabama generally (J.A. 198a, 214a-15a); (2) blacks were effectively prevented from being elected to the school board in Mobile by this overall system (J.A. 215a); (3) it would have been unnecessary to adopt any particular election system to prevent blacks from being elected to the school board (*id.*); and (4) even the possibility that blacks might be able to vote in the future would not have been a major motivating factor in any legislative actions (J.A. 219a).

This deplorable history of disfranchisement of blacks, by no means unique to Mobile or to Alabama, is today just that—history—in Mobile. There are no legal or extra-legal barriers preventing blacks from freely voting and fully participating in the political process in Mobile County, including the process of electing members of the Mobile school board. Thus, as the district court expressly found, "[a]ny person interested in running for school commissioner is able to do so" (J.A. 36a), and "blacks register and vote without hindrance" (J.A. 12a). The school board elections are partisan, and "both black[s] and whites participate in both parties." (*Id.*)

The record clearly shows that there is no white-oriented slating organization that effectively controls access to the nomination process. (J.A. 247a, 296a; Tr. 495, 500.) In fact, the only voting organization with any substantial political influence in Mobile County is the Non-Partisan Voters League, a local organization affiliated with the National Association for the Advancement of Colored People. (J.A. 329a, 408a-09a, 411a; Tr. 702.) The Non-Partisan Voters League is considered "the single most effective endorsing organization" in Mobile County and "the most cohesive and most effective voter organization" in the County. (J.A. 315a.) There is no white-oriented organization comparable to or as effective as the Non-Partisan Voters League. (J.A. 247a, 330a-31a; Tr. 494-95, 612.)

The nature of election campaigns for the Mobile County school board is influenced by the small size of the electorate and the fact that, until very recently, school commissioners served without salary. (J.A. 306a; Tr. 618.)[7] Accordingly, school board election efforts are relatively inexpensive—estimated at $2,000 to $5,000 (J.A. 331a, 343a, 413a)—and largely involve efforts to generate candidate name recognition among the voters (J.A. 414a-15a; Tr. 1320-21). A common pattern is that a candidate for commissioner fails of election the first time he or she runs but is elected in a subsequent effort. (J.A. 414a-15a.)

Particularly in view of the large and growing proportion of black voters—estimated at 24 percent of the voters casting ballots in the 1976 Mobile County primary elections (J.A. 9a)—there have been increasing efforts by

[7] Under a recently enacted state statute, school commissioners are now paid $50 a meeting and are reimbursed up to $300 a month for their expenses.

school board candidates actively to solicit black support. Both black and white political leaders testified that support from black voters was often significant to success, particularly in view of the effectiveness of the Non-Partisan Voters League, and that both black and white candidates solicit black votes and campaign actively in black as well as white areas.[8]

---

[8] Representative Cain J. Kennedy, a black and one of Mobile County's members of the Alabama House of Representatives, testified:

> "Q: What about the white politicians who do run in these county-wide elections. Do they solicit the votes of the black citizens?
>
> "A: I think they solicit the votes of the black citizens. Some campaign in the community. Some don't.
>
> "Q: How do they go about it?
>
> "A: It has been my experience that, of course, some of the white politicians come into the community and get to know the people in the community and talk about the problems in the community.
>
> "Again, some of the others contact key black people in the community, those people who have some kind of influence, and try to get votes that way." (J.A. 231a.)

Representative Gary Cooper, another black representative from Mobile County, who was active in his brother's successful 1974 race for Mayor of Prichard, testified:

> "Q: With respect to the white candidates that—whose campaigns you were involved in, would you tell us whether or not they sought the vote of the black community throughout Mobile County or throughout the City of Mobile?
>
> "A: Yes, sir, they did." (J.A. 259a.)

Mr. Robert Edington, a white political leader who had served in the Alabama Senate and House and who testified for plaintiffs, also explained that most white candidates make a "strong overture" to the black community:

> "Q: . . . [M]ost white candidates do attempt to get black votes in their campaigns, don't they?
>
> "A: Obviously they make every effort to get all the votes they can. They do, of course, make a strong overture to the black community, generally the leadership of the black community." (J.A. 304a.)

(footnote continued)

There was evidence that did indicate that a candidate's race is an important factor in Mobile County elections, including elections to the school board. (J.A. 228a.) There was also evidence of racially polarized voting, *i.e.*, whites voting for a white and blacks for a black when there is a head-to-head contest. (J.A. 256a.) Although four black candidates had campaigned for the school board between 1962 and 1974 and had reached the primary run-offs—in each case doing so in their first bid for elective office (Tr. 533-34)—none of these candidates was successful. (J.A. 12a-13a.)

There was also testimony that the black electorate has played an important "pivotal" or "swing vote" role in a number of school board and other Mobile County at-large elections. (J.A. 392a-93a, 410a-11a; Tr. 1327.) As John H. Friend, a professional economic and political consultant, testified, this fact came as "no surprise"; Mobile County candidates "are very much aware . . . that the black vote counts." (J.A. 395a.) As one example, Mr. Friend's analysis showed that the dominant black wards in Mobile had supported the winning candidate in 19 of the 27 at-large County commission races since 1960. (J.A. 389a.)

(footnote continued)

Senator Meyer Perloff, a white politician who narrowly won election to the Alabama Senate from Mobile County in an at-large run-off election against a black candidate in 1974 (winning by 389 votes), also testified to his campaign efforts in black and white areas of the County. (Tr. 1001-04.)

Representative James E. Buskey, a black representative to the House of Representatives elected in 1976, testified that in his 1974 campaign against Senator Perloff he also covered all areas that were heavily populated "and that included both black and white communities." (J.A. 351a.)

Mrs. Lonia M. Gill, a black candidate for the school board who reached the run-off election in 1974, testified that she campaigned "in communities, period. I contacted people. I didn't go out expecting blacks to elect me. I went to contact people." (Tr. 680.)

The District Court's Findings and Conclusions

The district court's consideration of the record was shaped by its understanding that the "controlling law" of the Fifth Circuit was provided by the decision of the court of appeals in *Zimmer* v. *McKeithen,* 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd per curiam on other grounds sub nom. East Carroll Parish School Board* v. *Marshall,* 424 U.S. 636 (1976). (J.A. 36a.) *Zimmer* sets forth four "primary" and several additional "enhancing" factors that district courts are directed to consider in determining whether an at-large election system has unconstitutionally "diluted" the black vote. These factors governed the district court's decision.

The first of the so-called *Zimmer* factors considered by the district court was "the openness [to blacks] in the slating process or candidate selection process." (J.A. 36a.) The court found that "blacks register and vote without hindrance," that "black[s] and whites participate in both parties" and that "[a]ny person interested in running for school commissioner is able to do so." (J.A. 12a.) The court went on to say that the "system at first blush appears to be neutral, but consideration of facts beneath the surface demonstrates the *effects* which lead the court to conclude otherwise." (J.A. 37a; emphasis in original.) Noting the four unsuccessful campaigns by blacks for school board positions, the court cited evidence that black politicians now "shy away" from County at-large elections, principally in the court's view because of "the polarization of the white and black vote." *(Id.)* Without any further explanation, the district court stated its conclusion that there is "a lack of openness to blacks in the political process in the school commissioners' election." (*Id.*)

The second *Zimmer* factor considered by the district court was the "unresponsiveness of the elected school

commissioners to the black minority." Here the district court was impressed by what it characterized as "dilatory actions" in a separate lawsuit seeking to bring about the desegregation of the school system. (*Id.*) The district court also said that the board "cannot justly claim credit for the improvement of the school system today, since they are operating under the watchful eye of the court . . . ." (J.A. 37a-38a.) The court, without reference to any specific instances of a failure to serve the interests of black citizens or voters or school children, concluded that "the countywide elected school commissioners as practiced in Mobile County has not [been], and is not, responsive to blacks on an equal basis with whites; hence there exists racial discrimination." (J.A. 37a.)

The third primary *Zimmer* factor considered by the district court was the existence of "a tenuous state policy showing a preference for at-large districts." This factor was considered briefly in the "Findings of Fact" section of the district court's opinion and in a two-sentence paragraph in its "Conclusions of Law" section. The latter read:

> "The Alabama legislature has offered little evidence of a preference one way or the other for multi-member or at-large districts in its counties. This court finds state policy regarding multi-member at-large districting as neutral." (J.A. 38a.)

The district court did not explain how this conclusion was consistent with its earlier factual findings that the Mobile County school commissioners have been elected on an at-large basis continuously since 1826 and that the "manifest policy of Mobile County has been to have at-large or multi member districting." (J.A. 20a.)

The fourth *Zimmer* factor considered by the district court was whether "past racial discrimination in general

precludes the effective participation [by the minority] in the election system." The district court concluded that the existence of such past discrimination "has helped preclude the effective participation of blacks in the election system today in the at-large system of electing school commissioners" (J.A. 21a), but this conclusion appears merely to reflect the significance placed by the district court on its finding of "racial polarization" in these elections. No other explanation is given of how any "past discrimination" did or could affect black participation in the election process.

The district court also found that the "enhancing" factors cited in *Zimmer* were generally present in the case of the at-large election of members of the Mobile school board. These "enhancing factors" include "the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographic subdistricts." (J.A. 36a.)

After separately considering each of the *Zimmer* factors the district court found that the plaintiffs had met their burden "by showing an aggregate of the factors catalogued in *Zimmer.*" (J.A. 41a.) On this basis the district court concluded that the at-large election of Mobile County school commissioners "results in an unconstitutional dilution of black voting strength." (*Id.*)

Before reaching this result, the court considered "defendants' contention that *Washington* [*v. Davis,* 426 U.S. 229 (1976),] makes it clear that to prevail the plaintiffs must prove that the statute establishing the at-large elections was adopted with a discriminatory *purpose.*" (J.A. 26a; emphasis in original.) The district court concluded that the "new Supreme Court purpose test" that it perceived in *Washington* did *not* apply to this case. The district court reached this result after characterizing

the Court's earlier holding in *Whitcomb* v. *Chavis,* 403 U.S. 124 (1971), as "if in a particular case the [at-large election] system *operates* to minimize or cancel out the voting strength of racial or political elements, the courts can alter the structure." (J.A. 28a; emphasis added.) The district court reasoned that the failure of the Court in *Washington* to cite *Whitcomb* or other cases in this area "leads this court to the conclusion that *Washington* did not overrule these cases nor did it establish a new Supreme Court *purpose* test and require initial discriminatory purpose where voter dilution occurs because of racial discrimination." (J.A. 34a; emphasis in original.)[9]

The Remedy

Having concluded that plaintiffs had demonstrated the unconstitutionality of the at-large election system according to the *Zimmer* criteria, the court then proceeded to fashion a remedy to include "small, single member districts" that "will provide blacks a realistic opportunity to elect blacks to the Board of School Commissioners." (J.A. 42a.) The district court adopted a districting plan submitted by plaintiffs, which created five separate districts with weighted average black populations of 13.9 percent (District 1), 11.7 percent (District 2), 61.0 percent (District 3), 56.8 percent (District 4), and 11.2 percent (District 5). (J.A. 43a, 51a.) The district court also concluded that representatives from the two predominantly black districts, Districts 3 and 4, should be elected in 1978, notwithstanding the fact that only one

[9] The district court also considered plaintiffs' claim that the required "purpose" or "intent" could be found on the facts before it based on a "tort standard" premised on the claim that the dilution of black voting in Mobile County was "a natural and foreseeable consequence" of the 1919 Act under which school commissioners are elected. (J.A. 30a-33a.) However, the district court expressly declined "to base its decision on this theory." (J.A. 33a.)

commissioner's term expired in 1978 — by coincidence that of a commissioner residing in District 4. (J.A. 44a.) The result of this decision was to create a board of six members following the 1978 elections until the next elections scheduled in 1980. To deal with the possibility of a tie vote, which the court said might render the board "ineffective," the court ordered that one of two named commissioners whose terms expire in 1980 be elected chairman of the board with no right to vote except in the event of a tie. (J.A. 46a-47a.)[10]

The Court of Appeals' Decision

The court of appeals (Goldberg, Ainsworth, Hill, JJ.) affirmed the judgment of the district court in a summary two-page opinion following consideration of the appeal on its summary calendar, without argument, pursuant to the court's Local Rule 18. (J.A. 1a-2a.) The court of appeals concluded that the district court "has applied the proper

[10] The court ordered that election of the non-voting chairman take place one month prior to the general election of November 7, 1978. However, the board members could not agree on a chairman, and three members of the board were held in contempt by the district court. The effect of orders issued by Mr. Justice Powell dated October 27 and October 31, 1978, was to stay this civil contempt order but to permit the elections under the new districting plan ordered by the district court. Justice Powell's order dated October 31, 1978, also provided that "with respect to the selection of a chairman of the school board, the District Court may take such other action consistent with this order as it deems appropriate."

Elections pursuant to the district court's earlier order were held November 7, 1978, and the newly elected board members were sworn in on November 15, 1978. Following a hearing on November 14, 1978, the district court entered an order dated November 24, 1978, specifically designating the board members who were to serve successively as non-voting chairman of the board and further enjoining the existing members of the board from "dismissing the appeal and petitions previously filed in this action in the Supreme Court of the United States."

standards for evaluating plaintiffs' contention that the election of school commissioners on an at-large basis dilutes the votes of black citizens," and that "the District Court's findings are not clearly erroneous and that these findings amply support the conclusion that Mobile County's at-large election system unconstitutionally depreciates the value of the black vote. *See Bolden* v. *City of Mobile,* 571 F.2d 238 (5th Cir. 1978)."[11]

SUMMARY OF ARGUMENT

I

The judgment below is predicated on the satisfaction of criteria for the invalidation of multi-member at-large electoral schemes enunciated by a majority of the court of appeals in *Zimmer* v. *McKeithen,* 485 F.2d 1297 (5th Cir. 1973) (*en banc*), an opinion whose authority as constitutional law this Court declined to endorse in affirming the judgment on other grounds in *East Carroll Parish School Board* v. *Marshall,* 424 U.S. 636 (1976). The district court applied the so-called *Zimmer* factors in the belief that, even after this Court's decisions in *Washington* v. *Davis,* 426 U.S. 229 (1976), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977), it was sufficient for the plaintiffs to show that the at-large method of electing Mobile County school commissioners resulted in "an unconstitutional dilution of

[11] The reference to *Bolden* was to the decision by a differently constituted panel of the court of appeals on an appeal by the City of Mobile from a decision by Judge Pittman—who also decided the instant case in the district court—that the City's commission form of government, which included at-large election of the three Mobile city commissioners, was unconstitutional. The City of Mobile's case was tried several weeks before this case. This Court noted probable jurisdiction of an appeal by the City of Mobile from the judgment of the court of appeals on October 2, 1978, No. 77-1844, and the City's case is to be heard in tandem with this case.

black voting strength," without regard to any discriminatory purpose. The court of appeals disagrees with this view but affirmed nevertheless, evidently on the ground that findings under the *Zimmer* factors supply the requisite discriminatory purpose.

Both the district court's view and that of the court of appeals are inconsistent with this Court's interpretation of the equal protection clause of the Fourteenth Amendment and of the Fifteenth Amendment. The district court was wrong in thinking that voting power dilution cases are not governed by the teaching of *Washington* v. *Davis* and *Arlington Heights* that a state denies the equal protection of the laws only when it engages in purposeful or intentional discrimination. The Fifteenth Amendment, similarly, is violated only if the State has deliberately contrived to deny or abridge the right to vote on account of race, color or previous condition of servitude.

Further, contrary to the judgment of the court of appeals, an affirmative finding under *Zimmer* cannot be made to supply the requisite purpose or intent. The *Zimmer* factors were devised in a case manifestly premised on the view then current that effects and not purpose were decisive. More fundamentally, the *Zimmer* factors provide no basis for inferring a discriminatory intent or purpose either at the inception of an at-large voting system or in its continuation. The court of appeals' effort to transmute the *Zimmer* factors into such a showing amounts, in substance, to the district court's erroneous assertion that the satisfaction of the *Zimmer* criteria suffices without more. That result is inconsistent with *Washington* v. *Davis* and *Arlington Heights* and with the course of decision under the Fourteenth and Fifteenth Amendments.

II

Even if it is assumed, *arguendo,* that the *Zimmer* factors were proper guides to decision, a proper analysis of these factors does not support the conclusion reached below that the at-large election of Mobile County school commissioners unconstitutionally "dilutes" black voting strength. The beginning point in any such analysis is a situation in which, because of racially polarized voting, minority candidates are not elected in at-large elections in proportion to the minority population. But this is only the starting point. The Constitution does not guarantee minority groups proportional representation. *E.g., Beer* v. *United States,* 430 U.S. 130, 136 n.8 (1976); *White* v. *Regester,* 412 U.S. 755, 765-66 (1973); *Whitcomb* v. *Chavis,* 403 U.S. 124, 149 (1971). There is no constitutional wrong even if the lack of proportional representation results from the "unfortunate practice" of "voting for or against a candidate because of his race . . . ." *United Jewish Organizations* v. *Carey,* 430 U.S. 144, 166-67 (1977).

Even under the *Zimmer* criteria there must be showings (1) that the minority lacks access to the candidate slating process, (2) that officials elected at large have been "unresponsive" to minority needs, (3) that the state has no more than a "tenuous" policy underlying the at-large system of elections, and (4) that the lingering effects of past discrimination preclude effective minority participation in the political process. The district court's affirmative findings on each of these four factors were fatally flawed, for various reasons.

The district court's findings on the first and fourth factors—involving access to the political process—incorrectly relied solely on the effect of polarized

voting, which is properly only the beginning point of the analysis. Properly construed the district court's basic findings on these two factors support the school board's position, not that of plaintiffs.

The court's findings as to the second factor—the "unresponsiveness" of the elected school board officials —erroneously relied on the school board's separate litigation over school desegregation, not on any judgment that the board is not currently responsive to the needs of black citizens or black parents or black school children.

Finally, and perhaps most seriously, in resolving the third factor—the force of the state's policy underlying the at-large elections—the court improperly gave no weight to Alabama's long-term, century-and-a-half commitment to the at-large manner of electing Mobile County school commissioners.

III

If proper constitutional principles are applied, as expounded in *Whitcomb* v. *Chavis* and *White* v. *Regester,* the plaintiffs have not proved any constitutional infirmity in the at-large manner of electing the Mobile County school commissioners. Plaintiffs in a case such as this must prove either (1) that the state's decision to provide for at-large elections was a racially motivated effort to submerge minority voting or (2) that a minority has been deliberately excluded from the political processes, which exclusion can be remedied by the replacement of the at-large system with separate districts in some of which minority voters will preponderate.

For reasons already indicated, the state's judgment to provide for at-large elections for the Mobile County school

board was without racial motivation, and blacks are plainly not excluded from the Mobile County political process. Further, in passing on the possible constitutionality of at-large voting systems for local governmental units—an issue not previously resolved by this Court, as noted in the special concurring opinion of four Justices in *Wise* v. *Lipscomb,* 98 S.Ct. 2493, 2502 (1978)—reviewing courts should be especially sensitive to the unique problems of local government bodies and to the needs of local groups, such as school boards, to administer the affairs of the community with an area-wide view (a goal promoted by the use of at-large elections).

ARGUMENT

I. THE CRITERIA BY WHICH THE CONSTITUTIONALITY OF THE MOBILE COUNTY SCHOOL BOARD'S AT-LARGE ELECTIONS WAS JUDGED ARE INCONSISTENT WITH DECISIONS OF THIS COURT CONSTRUING THE FOURTEENTH AND FIFTEENTH AMENDMENTS, PARTICULARLY AS THOSE DECISIONS REQUIRE A SHOWING OF AN INTENTION OR PURPOSE TO DISCRIMINATE.

The judgment below that the at-large election of the Mobile County school commissioners violates the Fourteenth and Fifteenth Amendments rests upon the purported satisfaction of criteria drawn from the majority opinion of the court of appeals sitting *en banc* in *Zimmer* v. *McKeithen,* 485 F.2d 1297 (5th Cir. 1973), an opinion that this Court went out of its way not to endorse when it affirmed the judgment on other grounds in *East Carroll Parish School Board* v. *Marshall,* 424 U.S. 636 (1976) (*per curiam*).

The district court held that plaintiffs had shown, by reference to the so-called *Zimmer* factors, that the effect of the at-large election system was "an unconstitutional dilution of black voting strength" and that, to prevail on their constitutional claim, they need not go further and demonstrate purposeful discrimination.

In similar, contemporaneous litigation, including a companion case involving the city government of Mobile, the court of appeals disagreed with the district court on the latter point but held that satisfaction of the *Zimmer* criteria demonstrated the requisite discriminatory intent. A different panel of the court affirmed the district court judgment in this case with a citation to the court's decision in the *City of Mobile* case.

In this section of our argument we shall demonstrate that the district court erred in its view that the Fourteenth and Fifteenth Amendments require no showing of a discriminatory purpose in voting power dilution cases, and that the court of appeals, correct on that point, is wrong in its view that the satisfaction of its *Zimmer* criteria supplies the requisite discriminatory purpose.

We lay the background for that argument with a discussion of the *Zimmer* opinion, which, as glossed itself by *Bolden* v. *City of Mobile,* 571 F.2d 238 (5th Cir. 1978), *prob. juris. noted,* No. 77-1844, and companion cases,[12] states the law of unconstitutional voting power dilution applied in the Fifth Circuit. The *Zimmer* litigation was an outgrowth of a lawsuit claiming that population disparities between wards used for electing members of the police jury and of the school board in rural East Carroll Parish,

[12] Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978), *petition for cert. filed,* No. 78-492, Sept. 22, 1978; Blacks United for Lasting Leadership, Inc. v. City of Shreveport, 571 F.2d 248 (5th Cir. 1978); Thomasville Branch, NAACP v. Thomas County, 571 F.2d 257 (5th Cir. 1978).

Louisiana, violated the "one-man, one-vote" principle. *Zimmer* v. *McKeithen, supra* at 1301. The district court adopted a reapportionment plan proposed by the East Carroll police jury that provided for the first time for at-large Parish elections for both the police jury and the school board. Such at-large elections were held in 1969 and 1970, but in 1971 the district court, on its own motion, ordered the submission of plans revised in the light of the 1970 census results. *Id.*

At this point a black resident and voter of East Carroll Parish was permitted to intervene to claim that this at-large election scheme violated the Fourteenth and Fifteenth Amendments and the Voting Rights Act of 1965. *Id.* The intervenor claimed that the shift to at-large elections invidiously discriminated against blacks, who in 1971 constituted 58.7 percent of the Parish's population but only 46 percent of its registered voters, allegedly because of past racial discrimination in voting procedures; from 1922 to 1962 no black resident of the Parish had been permitted to register to vote. *Id.* at 1301, 1304.

The district court upheld the proposed plan as against intervenor's constitutional and other challenges, and a panel of the court of appeals affirmed. *Zimmer* v. *McKeithen,* 467 F.2d 1381 (5th Cir. 1972). However, by a divided vote (9-6) the court of appeals sitting *en banc* reversed.

The majority's analysis was manifestly premised on its view that plaintiff's perceived constitutional right of "fair representation" was abridged either (1) if there was a deliberate racially motivated gerrymander or (2) if the effect of an at-large election scheme was " 'to minimize or cancel out the voting strength of racial or political elements of the voting population,' " without regard to

whether the scheme was "racially motivated" or "drawn along racial lines." *Zimmer* v. *McKeithen,* 485 F.2d at 1304 (citation omitted).

The court made it as clear as words could that its holding was based on a finding that plaintiff had met his burden under the *second* alternative, and that it had not even considered plaintiff's contention under the first:

> "In view of our holding that Marshall satisfied the burden with respect to the second standard, we need not entertain his contention that the departure from the firmly entrenched state policy against at-large voting in elections in police juries and school boards comes within the first standard." *Id.* (footnote omitted).

The court then identified the precise factors — subsequently to be referred to as the *Zimmer* factors — that it believed would support a finding under this second alternative:

> "[W]here a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts." *Id.* at 1305 (footnotes omitted).

The court of appeals then stated that "[t]he fact of dilution is established upon proof of the existence of an aggregate of these factors," with the caveat that "all these factors need not be proved in order to obtain relief." *Id.*

This Court affirmed the result reached by the court of appeals in *Zimmer* in a *per curiam* opinion. *East Carroll Parish School Board* v. *Marshall,* 424 U.S. 636 (1976). It did so solely on the ground that the district court had improperly ignored the rule of *Connor* v. *Johnson,* 402 U.S. 690 (1971), that single-member districts are to be preferred when a court comes to fashion a remedy for malapportionment. The Court expressly stated that its affirmance was "without approval of the constitutional views expressed by the Court of Appeals," characterizing those views as follows:

> "Relying upon *White* v. *Regester,* 412 U.S. 755 (1973), [the Court of Appeals] . . . seemingly held that multimember districts were unconstitutional, unless their use would afford a minority greater opportunity for political participation, or unless the use of single-member districts would infringe protected rights." *East Carroll Parish School Board* v. *Marshall, supra* at 638.

Despite the cloud thus cast on the authority of *Zimmer* for anything more than what the remedy should be for a case of malapportionment, the court of appeals has instructed all of its district courts that in voting power dilution cases the so-called *Zimmer* factors govern the decision. *E.g., Blacks United for Lasting Leadership, Inc.* v. *City of Shreveport,* 571 F.2d 248, 250 (5th Cir. 1978) ("The *en banc* court in *Zimmer* synthesized the dilution principles of *Regester* and *Chavis* by establishing certain criteria that a district court must address in deciding a dilution case.") In concept and in practice, the rule that arises from

application of the *Zimmer* factors establishes the presumptive invalidity of at-large voting systems throughout the southern states. As we shall show, such a rule is at odds with applicable constitutional principles.

A. Neither The Equal Protection Clause Of The Fourteenth Amendment Nor The Fifteenth Amendment Is Violated In The Absence Of A Showing That An Electoral System Such As An At-Large System Of Elections Was Motivated By Purposeful Discrimination.

1. In so-called voting power dilution cases, as in all others, a state denies the equal protection of the laws only if it discriminates purposefully.

Zimmer and the opinions of this Court on which the *en banc* majority there drew came before *Washington* v. *Davis,* 426 U.S. 229 (1976), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977). These latter cases laid to rest any doubt there might have been that a state does not deny to any person within its jurisdiction the equal protection of the laws within the meaning of the Fourteenth Amendment unless it discriminates purposefully against that person or a group of which he or she is a member.

Though the doctrine of these cases was by no means novel—the requirement of an "intentional or purposeful discrimination" in equal protection cases was stated at least as long ago as *Snowden* v. *Hughes,* 321 U.S. 1, 8 (1944)—the Court in *Washington* v. *Davis* recognized that there had been "indications to the contrary" in recent opinions such as *Palmer* v. *Thompson,* 403 U.S. 217 (1971), and *Wright* v. *Council of City of Emporia,* 407 U.S. 451 (1972). 426 U.S. at 242-44. It is not surprising therefore that dicta seeming not to distinguish "purpose"

from "effect" or "designedly" from "otherwise" in equal protection analysis should have been found in the opinions of the Court, including those that were relied upon in *Zimmer.*[13]

In other areas of equal protection jurisprudence, lower courts had also been bemused by these "indications to the contrary."[14] But in those and other areas it is now recognized that the equal protection clause does not invalidate a state action or enactment simply because the action or enactment has a disproportionate impact on a particular racial or other group.[15] Voting power dilution cases logically stand no differently.

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[13] The key phrase in *Zimmer* is that plaintiffs may make out a case by proving that " 'designedly or otherwise' " an electoral scheme operates to minimize or cancel out the voting strength of racial or political elements of the population. 485 F.2d at 1304. This language was first used by this Court in Fortson v. Dorsey, 379 U.S. 433, 439 (1965), and was repeated in Burns v. Richardson, 384 U.S. 73, 88 (1966). In *Fortson,* where the Court rejected a challenge to multi-member districts, the Court said that, if it were ever demonstrated that "designedly or otherwise" such a minimization or cancelling out of voting strength occurred as a result of multi-member districts, "it will be time enough to consider whether the system still passes constitutional muster." 379 U.S. at 439. Again in *Burns,* the Court approved the multi-member districts that were at issue. It is notable that the "designedly or otherwise" phrase was dropped from the formulation when the Court actually considered the issue in the two voting power dilution cases it has decided, Whitcomb v. Chavis, 403 U.S. 124, 143 (1971), and White v. Regester, 412 U.S. 755, 765 (1973).

[14] *E.g.,* Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920 (2d Cir. 1968) (urban renewal); Kennedy Park Holmes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971) (zoning).

[15] *E.g.,* Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977) (public housing); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) (zoning); Dayton Bd. of Ed. v. Brinkman, 433 U.S. 406 (1977) (school desegregation); Casteneda v. Partida, 430 U.S. 482 (1977) (jury selection).

The intent doctrine of *Washington* v. *Davis* and *Arlington Heights* has its impact when a challenged state statute or action is, as in this case, neutral on its face. In the case where the discrimination appears on the face of the state enactment—where for example, state law requires racially separate schools or facilities or provides that certain election districts shall elect more representatives than other districts with a comparable or greater population—there is no need to examine the state's purpose in enacting the law to assess whether it is action by the State that may be said to have denied to any person the "equal protection of the laws." In such cases, it is clear from the statute itself that state action has created the unequal treatment. However, when the state action is neutral on its face—involving for example, the drawing of an election district boundary or a decision to provide for elections on an at-large basis—proof of a "discriminatory purpose" is essential to a showing that it is action by the *State* that is responsible for any "invidious discrimination" that has resulted. *See Village of Arlington Heights* v. *Metropolitan Housing Development Corp., supra* at 270-71 n.21; *Whitcomb* v. *Chavis, supra* at 154-55; *Keyes* v. *School District No. 1,* 413 U.S. 189, 255-56 (1973) (Rehnquist, J., dissenting).

There is, we submit, no real doubt that the "purposeful discrimination" requirement articulated by the Court in *Washington* v. *Davis* and *Arlington Heights* applies with full force to plaintiffs' claim that the at-large election of Mobile County school board members constitutes a denial of their rights under the equal protection clause. The Court's statement in *Arlington Heights* that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause," 429 U.S. at 265, was emphatic and unqualified. Further, both in *Arlington Heights* and in *Washington* v. *Davis,* the Court specifically cited as support for this view its earlier decision in *Wright* v. *Rockefeller,* 376 U.S. 52 (1964), an election districting case that raises considerations in the "racial gerrymandering" area directly analogous to those involved in a claim that an at-large districting plan unconstitutionally discriminates against black residents. 429 U.S. at 265; 426 U.S. at 240.

Mr. Justice Stewart stated the point matter-of-factly in his concurring opinion in *United Jewish Organizations v. Carey,* 430 U.S. 144, 179-80 (1977), in which Mr. Justice Powell joined. That was a case in which, as Justice Stewart put it, the question presented was "whether New York's use of racial criteria in redistricting Kings County violated the Fourteenth or Fifteenth Amendment." "Under the Fourteenth Amendment," the Justice said, "the question is whether the reapportionment plan represents purposeful discrimination against white voters," citing *Washington* v. *Davis.* He added that "[d]isproportionate impact may afford some evidence that an invidious purpose was present," citing *Arlington Heights,* but he concluded that, even in the circumstances of a statute that professedly was drawn with an awareness of race, New York had not "acted with the invidious purpose of discriminating against white voters."

The court of appeals therefore was clearly right in concluding in the City of Mobile's case and its companions that the equal protection clause requires a showing of purposeful discrimination in voting power dilution cases. *See, e.g., Nevett* v. *Sides,* 571 F.2d 209, 217-19 (5th Cir. 1978).

That leaves the district court below, which concluded in this case as it did in the City of Mobile's case that the requirement of a showing of a "discriminatory purpose" does not apply to a claim of unconstitutional dilution of

minority voting power. Apparently, the court's judgment was based upon (1) its reading of this Court's opinions in so-called "voter dilution" cases as not requiring a showing of such a "discriminatory purpose" and (2) its conclusion that, since this Court in *Washington* v. *Davis* did not specifically cite these "voter dilution" cases, *Washington* did not "overrule these cases" or "establish a new Supreme Court purpose test" applicable to such cases. (J.A. 28a, 34a.)

That the district court was wrong in its view of this Court's decisions will be demonstrated below. (See pp. 56-60, *infra.)* Because *Whitcomb* v. *Chavis,* 403 U.S. 124 (1971), and *White* v. *Regester,* 412 U.S. 755 (1973), are fully consonant with *Washington* v. *Davis* and *Arlington Heights,* this Court had no special need to cite the earlier decisions, much less to "overrule" them.

2. As the court of appeals has concluded, a showing of a "discriminatory intent" is also required to support a claim founded on the Fifteenth Amendment.

The court of appeals was also clearly correct in concluding, in the City of Mobile's case and its companions, that racially discriminatory motivation or intent is a requisite under the Fifteenth Amendment as well as the Fourteenth.

The question was not considered in either opinion below but was resolved by the court of appeals in *Nevett* v. *Sides,* 571 F.2d 209 (5th Cir. 1978), *petition for cert. filed,* No. 78-492, Sept. 22, 1978, in language adopted by reference in *Bolden* v. *City of Mobile,* 571 F.2d 238, 241 (5th Cir. 1978), *prob. juris. noted,* No. 77-1844, which in turn was cited for the summary affirmance in this case.

In *Nevett* the court of appeals held that a finding of invidious racial motivation is a necessary element of any

successful claim that an at-large election scheme violates the Fifteenth Amendment. 571 F.2d at 220-21. Its analysis appears irrefutable.

First, the court found that, "[b]road though the reach of the [fifteenth] amendment may be, it has been invoked successfully only in cases founded on acts of intentional racial discrimination." *Id.* at 220. The court noted that "[t]he necessary motivation was painfully apparent in the early cases striking down the exclusion of blacks from party primaries, . . . the grandfather clause, . . . and the invidious administration of literacy tests . . . ." *Id.*[16] And it said that "racially discriminatory motivations were unmistakably present" in *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960), this Court's highly relevant racial gerrymander precedent. *Id.* at 220-21. These cases "illustrate what is apparent on the face of the amendment: a showing of racially motivated official action that infringes the right to vote is sufficient to state a cause of action." *Id.* at 221.

If racial motivation is sufficient to state a claim, is it necessary? The court found an affirmative answer dictated by *Wright* v. *Rockefeller,* 376 U.S. 52 (1964). The court noted that the plaintiff in *Wright* claimed under the Fifteenth Amendment as well as the Fourteenth and reasoned that the holding in *Wright* that "a showing of intentional discrimination was essential to a valid claim . . . implies as a matter of logic that such a demonstration is necessary under both fourteenth and fifteenth amendments." 571 F.2d at 221. As the court noted and as we have pointed out, *Wright* v. *Rockefeller* was treated as

[16] Citing, respectively, Terry v. Adams, 345 U.S. 461, 463-65 (1953); Guinn v. United States, 238 U.S. 347, 364-66 (1915); and Louisiana v. United States, 380 U.S. 145, 151-53 (1965).

exemplary of the intent requirement of the Fourteenth Amendment in both *Washington* v. *Davis* and *Arlington Heights.* (Pp. 30-31, *supra.*)

The requirement that a state act purposefully to deny or abridge voting rights on racially discriminatory grounds if it is to be held in violation of the Fifteenth Amendment is, as the court of appeals indicated, reflected in others of this Court's decisions construing the Amendment. *Louisiana* v. *United States,* 380 U.S. 145 (1965), one of the court of appeals' examples, and *Lane* v. *Wilson,* 307 U.S. 268 (1939), famed for the dictum that the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination," *id.* at 275, are illustrative of the point that the Amendment nevertheless reaches only those modes of discrimination that have been deliberately contrived by a state. In *Louisiana* v. *United States* the Court found that an "interpretation test" established by Louisiana as a condition to voting registration was unconstitutional. Louisiana had enacted this test only after a prior state statute containing a grandfather clause aimed at excluding blacks from voting had been invalidated.[17] The Court found that the same intent to exclude blacks originally reflected in the grandfather clause underlay the state's subsequent resort to the readily manipulable subjective qualifications for voting. 380 U.S. at 152. In *Lane* v. *Wilson* the Court found a violation of the Fifteenth Amendment in an Oklahoma voting qualifications statute superseding a prior statute containing an unconstitutional grandfather clause. The qualifications statute provided that citizens not voting prior to 1914 had

[17] Strikingly, the 1898 statute containing the grandfather clause had been espoused by the then-Governor of Louisiana as a "more upright and manly" method of "keeping Negroes from voting," than the methods adopted in other states of merely using subjective registration qualifications that were applied in a discriminatory fashion. 380 U.S. at 152.

twelve days in which to register and further that the failure to register in this period would result in perpetual disfranchisement. The Court in *Lane* emphasized that its prior decisions had expounded "the reach of the Fifteenth Amendment against *contrivances* by a state to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color . . . ." 307 U.S. at 275 (emphasis added).

Once again a useful summary is contained in the separate opinion in *United Jewish Organizations* v. *Carey,* 430 U.S. 144, 179-80 (1977), to which we have referred above. There Mr. Justice Stewart joined by Mr. Justice Powell, citing *Wright* v. *Rockefeller, White* v. *Regester* and other cases, in summarizing the law under the Fifteenth Amendment used the same term "contrivance," a term compatible only with a requirement of deliberate, purposeful state action to abridge or deny voting rights on racial grounds.[18]

[18] In a specially concurring opinion in Nevett v. Sides, 571 F.2d 209, 231 (5th Cir. 1978), Judge Wisdom took issue with the majority's conclusion that proof of a "racially discriminatory purpose" is a necessary requirement of a claim under the Fifteenth Amendment. Judge Wisdom found "nothing in the amendment itself requiring proof of legislative purpose," *id.* at 234, and concluded that the functions that the "intent requirement" serves in litigation under the equal protection clause do not apply to litigation under the Fifteenth Amendment, *id.* at 235-36. Judge Wisdom concluded that, "[w]hatever the status of intent and the right to vote under the equal protection clause, intent should be irrelevant to the fifteenth amendment." *Id.* at 236.

One fundamental flaw in this analysis is reflected in its characterization of the Fifteenth Amendment.

> "The fifteenth amendment provides that the 'rights of citizens of the United States to vote shall not be denied or abridged . . . on account of race.' There is nothing in the amendment itself requiring proof of legislative purpose." *Id.* at 234.

(footnote continued)

B. The Attempt By The Court Of Appeals To Rationalize The Conceded Need For Proof Of A "Discriminatory Intent" With Its *Zimmer* Factors Is Unsuccessful.

The district court did not base its conclusion that black voting power had been unconstitutionally diluted by the at-large manner of election of Mobile County school commissioners on a finding that the dilution was intentional or racially motivated. It concluded, as we have said, that a showing of intent or racial motivation is not required under either the Fourteenth or the Fifteenth Amendment. Its judgment that the at-large election system in Mobile was unconstitutional was based on the effects of the system, as effects are captured in the *Zimmer* factors.

The court of appeals, affirming in its brief unpublished opinion, said that the district court had "applied the

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(footnote continued)
The quotation omits the three critical words: "by any State." With the addition of these words the Fifteenth Amendment provides that the

> "rights of citizens of the United States to vote shall not be denied or abridged . . . *by any State* on account of race, color, or previous condition of servitude." (Emphasis added.)

With this addition it becomes apparent why a claim that, for example, an at-large electoral system violates the Fifteenth Amendment requires proof that the system was the product of a "discriminatory intent." Since an at-large system is neutral on its face, even if the system in fact *results* in some "abridgment" of the right of black citizens to vote, the *State* cannot be said to be responsible for this result. The State in such a case has made no judgment "on account of race, color, or previous condition of servitude." As in the case of a claim that state action neutral on its face violates the equal protection clause, unless this action was the product of a racially discriminatory purpose there is not the predicate of action "by any State" that is expressly required by the Fifteenth Amendment. (See p. 30, *supra*, and *see also* Terry v. Adams, 345 U.S. 461, 473-76 (1952) (Frankfurter, J., concurring).)

proper standards," that its findings were not clearly erroneous and "that these findings amply support the conclusion that Mobile County's at-large election system unconstitutionally depreciates the value of the black vote." (J.A. 2a.) The court then gave the citation: "*See Bolden* v. *City of Mobile,* 571 F.2d 238 (5th Cir. 1978)." Even though the cases were decided by different panels, we have assumed that the court thereby meant to draw support for its affirmance in this case from the analysis reflected in *Bolden.*

In *Bolden,* and the three other cases that the court of appeals consolidated with *Bolden* for decision (p. 24 n.12, *supra*), the court decided, as we have just seen, that a showing of intentional discrimination is necessary in the case of "racially based voting dilution claims." Having so decided, the court attempted the tour de force of turning its *Zimmer* factors into the requisite showing of intent. It held (1) that the *Zimmer* analysis *is* consistent with the requirement that a showing be made that an at-large districting scheme "exists because of invidious racial considerations," and (2) that, as a matter of law, an affirmative finding under the *Zimmer* mode of analysis that is otherwise sustainable *necessarily* satisfies this requirement. *Id.* at 222, 225. Its basic reasoning is in *Nevett* v. *Sides,* 571 F.2d 209, 221-28 (5th Cir. 1978), and there is amplification in *Bolden* v. *City of Mobile, supra* at 245-46.

The court of appeals' effort does not work. Factors that were devised for and used to sustain a judgment that an at-large electoral scheme was unconstitutional because of its effect cannot rationally be transmuted into the equivalent of deliberate racial discrimination.

There is no doubt, to begin with, that the *Zimmer* factors were indeed devised in a case decided solely on the basis of effects and not at all on the basis of purpose.

Judge Wisdom, concurring separately in *Nevett* v. *Sides,* pointed out that uncomfortable fact to his brethren. 571 F.2d at 231. We have described the *Zimmer* decision above. (See pp. 24-27, *supra.)* It requires at least an active imagination to read *Zimmer* as the court of appeals does as "impliedly recognizing the essentiality of intent in dilution cases . . . . " *Nevett* v. *Sides, supra* at 215.

The court's attempt at rationalization does not rise above this flawed source. It runs along these lines.

First, the court recognizes and, for its immediate purpose, makes a virtue of the fact "that mere disproportionate effects are not enough to invalidate an at-large plan and hence . . . the *Zimmer* criteria purport to establish something more." *Id.* at 222. Why the "something more," which plainly was not associated with any requirement of purposeful discrimination when the *Zimmer* criteria were devised, should be so associated now is not clear *a priori.* We submit that the court's explication, *id.* at 222-24, does not make the point any clearer. The court simply asserts that an affirmative finding on any of the *Zimmer* factors constitutes "circumstantial evidence" that the at-large system "exists because of invidious racial considerations." *Id.* at 222. The assertion does not withstand analysis. In fact, several of the *Zimmer* factors could just as well support a finding that a system of at-large election was *not* the result of "invidious racial considerations." Consider the first of the *Zimmer* factors, the "lack of access to the process of slating candidates." As a theoretical matter, a district court finding that a minority had been denied access to the slating process could as easily support an inference that an at-large system was *not* adopted to discriminate against minorities, on the theory that, since the minority had already been thus effectively

excluded from the political process by the demands of slating, there was no need to adopt an at-large system to accomplish this same purpose.

That would be enough except that the court of appeals has a subordinate line of argument that is amplified in *Bolden* v. *City of Mobile* and thus may be particularly relevant to this case. This argument is that, at least in the case of an at-large election system in existence for many years, the *Zimmer* analysis establishes the discriminatory *effect* of the at-large system, and the failure of a state legislature affirmatively to eliminate a system having such a discriminatory effect demonstrates the necessary "discriminatory intent" to maintain the system. *Bolden* v. *City of Mobile, supra* at 245-56.[19]

In the first place, at least on its face this theory does not even require that the state legislature be aware of the discriminatory impact of an at-large system of election for there to be imputed to it an intent to maintain the allegedly discriminatory system. Not suprisingly in view of the exclusive emphasis on effect rather than purpose in *Zimmer,* nothing in the *Zimmer* analysis requires a district court to determine whether the state—whatever "the state" would mean in this context—was aware of any racially disproportionate impact.

Even if the state legislature was aware of the disproportionate racial impact of an at-large election system, the logic of the inference that the court of appeals would draw is highly questionable. As this Court has recognized, a legislature is quite properly motivated by a variety of different considerations in making legislative judgments. *E.g., Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252, 265 (1977). Even in

[19] This reasoning is also suggested in the district court's opinion in the instant case. (See J.A. 30a-33a.)

the case of legislative *action,* courts find it very difficult to determine the legislature's intent. *See, e.g., Palmer* v. *Thompson,* 403 U.S. 217 (1971); *United States* v. *O'Brien,* 391 U.S. 367, 383-84 (1968). This difficulty is magnified many times when the question involves the reasons for legislative *inaction.*

Further, as Judge Wisdom pointed out in his concurring opinion in *Nevett,* 571 F.2d at 231-32, the majority's view of the effect of legislative inaction is also inconsistent with this Court's decision in *Washington* v. *Davis.* In *Washington* v. *Davis,* the district court had found that the testing requirements complained of had a clearly disproportionate impact on blacks. Yet there was no suggestion in this Court's opinion that the necessary discriminatory intent could have been found in the failure of the District of Columbia Police Department to amend its testing procedures to eliminate or ameliorate the apparent disproportionate racial impact.

In fact, the logical result of the discriminatory maintenance analysis suggested by the court of appeals would be to eliminate altogether the requirement of a discriminatory purpose, at least in the cases where an at-large election system has been operated long enough to make the alleged discriminatory impact observable by the state legislature. In all such cases, the argument could be made that the election scheme, though racially neutral in its inception, had become a vehicle for intentional state discrimination because the state had taken no action to correct it. This would, however, be tantamount to a holding that such at-large systems are *per se* unconstitutional when they have such a disproportionate racial result, a proposition that this Court has rejected time and again. (See pp. 42-43, 56-57, *infra.)*

In the course of one such rejection, the Court observed in *Whitcomb* v. *Chavis,* 403 U.S. 124, 156 (1971), that the proposition, "although on the facts of this case limited to guaranteeing one racial group representation, is not easily contained." Other interest groups would no doubt seize upon the theory to litigate claims that particular at-large election systems "intentionally" discriminate against their interests because of their allegedly "known" impact of submerging "their votes" in the general votes. "At the very least, affirmance . . . would spawn endless litigation concerning the multimember district systems now widely employed in this country." *Id.* at 157.

The artificiality of the court of appeals' whole endeavor is perhaps best manifested in one passage of its opinion in *Bolden* v. *City of Mobile, supra.* The court was dealing there, this Court will recall, with a district judge —the same district judge who decided this case—who thought that *Washington* v. *Davis* and the *Zimmer* criteria were at odds. The court, after concluding that the district judge's findings were not clearly erroneous and that they supported his conclusion that the at-large electoral system of the City of Mobile "unconstitutionally depreciates the value of the black vote," said that these findings also "compel the inference that the system has been maintained with the purpose of diluting the black vote, thus supplying the element of intent necessary to establish a violation of the fourteenth amendment . . . ." 571 F.2d at 245. In other words—and this must have been the reasoning in our case as well—whether the district judge realized it or not, he correctly inferred the intent that he thought was unnecessary from the analysis of the *Zimmer* factors that he engaged in for a wholly different purpose.

If fashions of judicial opinion writing were those of another day, the court of appeals might have said that the

presence of *Zimmer* factors gives rise to a necessary presumption of discriminatory intent. That is in fact the point to which its treatment of the matter brings it. One of the great masters has taught us that, when a judge says that *A* is necessary but *A* can be presumed from *B*, he is in fact saying that *A* is not necessary and *B* is sufficient. 9 Wigmore, *Evidence* § 2492 (3rd ed. 1940). We do not believe that this Court meant anything so trivial by its recent insistence on a showing of purposefulness in constitutional discrimination cases as would be the case if something like the *Zimmer* factors were sufficient to satisfy its insistence.

II. EVEN ASSUMING THE APPLICABILITY OF THE *ZIMMER* CRITERIA TO A DETERMINATION OF THE CONSTITUTIONALITY OF THE AT-LARGE ELECTION OF MOBILE COUNTY SCHOOL BOARD MEMBERS, THOSE CRITERIA WERE NOT SATISFIED ON THIS RECORD.

The beginning point in any voting power dilution case is an at-large scheme of election in which, because of racially polarized voting habits (or politically polarized voting habits), a minority, racial or otherwise, is chronically unrepresented or underrepresented. The law is clear that the plaintiff must advance substantially beyond that beginning point in order to prevail. "This Court has . . . rejected the proposition that members of a minority group have a federal right to be represented in legislative bodies in proportion to their number in the general population." *Beer* v. *United States,* 425 U.S. 130, 136 n.8 (1976), citing *Whitcomb* v. *Chavis,* 403 U.S. 124, 149 (1971). *See also White* v. *Regester,* 412 U.S. 755, 765-66 (1973): "To sustain claims [that multi-member districts are being used invidiously to cancel out or

minimize the voting strength of racial groups] it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential."

Just last year the Court said that, although "voting for or against a candidate because of his race is an unfortunate practice," it happens; and "in any district where it regularly happens, it is unlikely that any candidate would be elected who is a member of the race that is in the minority in that district." *United Jewish Organizations* v. *Carey,* 430 U.S. 144, 166-67 (1977). The Court then made clear that these facts alone are without constitutional significance.

> "However disagreeable this result may be, there is no authority for the proposition that the candidates who are found racially unacceptable by the majority, and the minority voters supporting those candidates, have had their Fourteenth or Fifteenth Amendment rights infringed by this process." *Id.* at 167.

In this section of our argument we assume, for the sake of the argument only, that whatever it is that must be proved beyond a lack of proportional representation because of the inability to win elections is fairly summed up in the *Zimmer* factors utilized by the district court. Even on this assumption there is no proper basis for either the district court's judgment or the court of appeals' affirmance of it. On analysis, the district court found little more than that there is polarized voting in Mobile County that has prevented the election of blacks to a school board that has engaged in litigation over student and faculty desegregation in the aftermath of *Brown* v. *Board of Education,* 347 U.S. 483 (1954). The description fits so many southern communities as to indicate, except to one

ready to condemn the entire region because of the sins of the past, its utter lack of utility in distinguishing those jurisdictions that invidiously discriminate against black voters from those that do not. In addition, the court did not give proper weight to the policy embodied in at least 140 years of at-large elections for Mobile's school commissioners.

In short, the district court's judgments with respect to each of the four primary *Zimmer* factors were based on an incorrect view of the law or were clearly erroneous.[20] Accordingly, there is no basis for the district court's ultimate conclusion that "plaintiffs have met the burden cast in *White* and *Whitcomb* by showing an aggregate of the factors catalogued in *Zimmer.*" (J.A. 41a.) [21]

[20] If the district court's findings on each of the *Zimmer* factors involved "basic facts," they would be entitled to great weight and could be set aside only if "clearly erroneous," Fed. R. Civ. P. 52(a), that is, only if this Court "on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). However, the district court's findings on these *Zimmer* factors are manifestly not such "basic facts" but are instead either "ultimate findings" derived from more basic findings or "conclusions of law," which are not entitled to the "clearly erroneous" deference. *See* United States v. Mississippi Valley Generating Co., 364 U.S. 520, 526 (1961); United States v. DuPont & Co., 353 U.S. 586, 598 (1957); 9 Wright & Miller, Federal Practice and Procedure: Civil §§ 2583 *et seq.* (1969). Indeed, as will be developed below, in the case of each of the *Zimmer* factors the "basic facts found by the District Court [will] demonstrate the error of its conclusion." United States v. DuPont & Co., *supra* at 598. Further, to the extent that the district court's judgments on these *Zimmer* factors are considered findings of fact within the scope of Rule 52(a) we submit that they are "clearly erroneous."

[21] The district court also briefly considered each of the "enhancing" factors identified in *Zimmer*—the existence of large districts, majority vote requirements, anti-single shot voting provisions, and the absence of geographical subdistricts—and found all essentially present. (J.A. 39a-40a.) It seems apparent, however, that the district court's ultimate conclusion of "voter dilution" was not

(footnote continued)

To reiterate, the primary *Zimmer* factors, *Zimmer* v. *McKeithen, supra,* 485 F.2d at 1305, are as follows:

> (1) A demonstration that minority residents suffer "a lack of access to the process of slating candidates."
>
> (2) A demonstration that there is an "unresponsiveness of legislators" to the "particularized interests" of the minority.
>
> (3) A demonstration that there is no more than a "tenuous state policy underlying the preference for multi-member or at-large districting."
>
> (4) A demonstration that "the existence of past discrimination in general precludes the effective participation [of the minority] in the election system."

For convenience of discussion we group the first and fourth factors and deal with their treatment by the district court first, then with the second factor and finally with the third, the policy that has underlain Mobile's at-large election system for the past century and a half.

(footnote continued)

substantially influenced by its conclusions on these "enhancing" factors. (J.A. 40a-42a.) In fact, the district court quite evidently disagreed with the rationale of the third enhancing factor (the presence of an anti-single shot voting provision), believing from his "15 years experience as a state judicial officer subject to the electoral process" that the "public's best interest is served" by the Alabama equivalent of a prohibition of single-shot voting, the requirement that, when two or more at-large seats are at stake, candidates run "head to head" for designated seats. (J.A. 22a n.16.)

A. The District Court's Conclusions On The First And Fourth *Zimmer* Factors Are Nothing More Than A Function Of What Is Acknowledged But Cannot Support The Court's Result, The Evidence Of Racially Polarized Voting Habits.

1. The district court's conclusion that blacks were denied "equal access to the slating or candidate selection process" is erroneous and reflects a misunderstanding of this factor.

The basic facts found by the district court in considering the first *Zimmer* factor—access to the process of slating candidates—were (a) that "[t]here are no formal prohibitions against blacks seeking office in Mobile County," (b) that "blacks register and vote without hindrance," (c) that the "election of the school commissioners is partisan and black[s] and whites participate in both parties," and (d) that "[a]ny person interested in running for school commissioner is able to do so." (J.A. 12a, 36a.)

On the strength of such findings, the court should have concluded that blacks did have equal access to the slating or candidate selection process. The situation in Mobile stands in sharp contrast to the situation in Dallas County, Texas, a subject of this Court's opinion in *White* v. *Regester*, 412 U.S. 755 (1973), from which the first *Zimmer* factor was derived.[22] Dallas County black citizens had been "effectively excluded from participation in the Democratic primary selection process," largely through

[22] There is no doubt of the source of this factor or of its importance. Indeed, in making denial of access but one of several factors designed to test whether an at-large system of elections has the effect of diluting minority voting power, we believe that the court of appeals misapprehended the nature and significance of what this Court had to say about the denial of access in White v. Regester, 412 U.S. 755, 766-68 (1973). (Pp. 57-60, *infra*.)

the operation of a "white-dominated" slating organization that was "in effective control of Democratic Party candidate slating" in Dallas. 412 U.S. at 766-67. The district court also found that the organization "did not need the support of the Negro community to win elections" and that it "did not therefore exhibit good faith concern for the political and other needs and aspirations of the Negro community." *Id.*

The district court in this case found no such slating organization operating in Mobile County. Indeed, although not mentioned by the district court in its opinion, the record clearly indicates that there is no effective "white-oriented" slating organization at all (J.A. 247a, 330a-31a; Tr. 494-95), and that the only effective political organization in Mobile County primaries is the Non-Partisan Voters League, a local black endorsing organization (J.A. 315a, 329a, 411a, 414a-15a). The League was described as "the single most effective endorsing organization" in the County and in fact "the most cohesive and most effective voter organization in Mobile County." (J.A. 315a.)

Nor is there evidence in the record that blacks are otherwise prevented from becoming candidates for the Mobile County school board. For example, at the time of trial the position of school commissioner was not a paid position and, in part for this reason, the cost of a school board election campaign has been modest, $2,000 to $5,000. (J.A. 331a, 343a, 413a; Tr. 618.) The principal campaign effort is to generate name recognition among the voters (J.A. 414a-15a; Tr. 1320-21), with paid advertising consisting principally of placards, cards, bumper stickers, etc. (J.A. 326a; Tr. 679).

Neither black candidates nor others testified to any barriers, formal or informal, to blacks becoming candidates for the school board. Mrs. Lonia M. Gill, a black

educator who was defeated in a run-off election for the board in 1974, testified that she campaigned countywide (J.A. 326a), that she got compaign contributions from both whites and blacks (J.A. 327a), that she received the endorsement of the Mobile County Teachers Association as well as the Non-Partisan Voters League and several other groups (J.A. 327a-28a), and that, although she lost in her first bid for public office, she "enjoyed the campaign, because it was very rewarding" (J.A. 326a).

Nevertheless, the district court concluded in terms that blacks were denied "equal access to the slating or candidate selection process." (J.A. 15a.) But that conclusion was solely a function of the court's mistaken view that blacks could be said to be "denied access" to the candidate selection process if they were "discouraged" from becoming candidates for the Mobile County school board by a combination of (1) racially polarized voting, (2) the numerical minority of black voters in Mobile County, and (3) the fact that four blacks had run unsuccessfully for the school board since 1962, Mrs. Gill being the latest. (J.A. 11a-15a.) But a conclusion that elections are lost in part because of the "unfortunate practice" of voting for or against someone on account of his race simply returns us to the beginning point of the inquiry. It is not the "something more" that each *Zimmer* factor is supposed to be.

There is no doubt that the basis of the district court's conclusion is as we have stated it. Its basic findings that there are no obstacles to black participation in the political process have been quoted or cited above. These findings plainly do not support its conclusion. As support, it cited only the evidence that blacks had lost school board elections and testimony indicating "general polarization in the white and black voting." Since black voters are a numerical minority in Mobile County—accounting for

24.4 percent of the vote in the 1976 primary election (J.A. 9a)—the testimony indicated that such racially polarized voting made it "highly unlikely" that a black candidate could be elected when running against a white candidate. That fact in turn was said to "discourage" blacks from running for the school board. (J.A. 15a.) The court's reasoning from these data to a conclusion that access is denied is quite transparent:

> "The court finds that the structure of the at-large election of school commissioners combined with strong racial polarization of the county's electorate continues to effectively discourage qualified black citizens from seeking office or being elected thereby denying blacks equal access to the slating or candidate selection process." (*Id.*)

2. The district court's conclusion that the existence of past discrimination "precludes the effective participation" of blacks in the Mobile County school board election system is unsupported by its findings or by any credible evidence.

Unquestionably there has been past discrimination against black voters in Mobile, in Alabama and in the South. It does not take a lawsuit to establish that fact. The fourth inquiry called for by *Zimmer* is whether the existence of such past discrimination "precludes the effective participation" of blacks in the present electoral system.

Instead of making that inquiry, the district court again returned to the beginning point and noted that voting in Mobile County is racially polarized. Thus, the court said:

> "The racial polarization existing in the city and county elections has been discussed herein.

> The court finds that the existence of past discrimination has helped preclude the effective participation of blacks in the election system today in the at-large system of electing school commissioners." (J.A. 21a.)

There is absolutely no analysis of what past discrimination against black voters—characteristic of the entire South—has to do with polarized voting in Mobile County, much less of how it operates to preclude blacks from participating in Mobile County school board elections.

If the district court's ultimate findings are enough to satisfy the first and fourth *Zimmer* criteria, then those criteria add nothing to the phenomenon of polarized voting, which is the point at which analysis is supposed to begin. On the other hand, the court's underlying findings in substance dictate a conclusion that is the opposite of the court's own, that is, that, polarization aside, past discrimination has been overcome and there are today no barriers to black participation in the Mobile County political process. If, therefore, the *Zimmer* criteria are relevant at all to the judgment in this case, the first and fourth factors work for the school board, not for plaintiffs.

B. The District Court's Conclusion That The At-Large Elected Mobile County School Board Members Have Not Been Responsive To Minority Needs Reflects A Misplaced And Unjustified Reliance On Conclusions Reached In Unrelated Litigation.

The district court's discussion of whether Mobile County school board has been "responsive to minority needs," the second *Zimmer* factor, deals almost exclusively with a desegregation lawsuit in which the school board has been engaged since 1963. There is no

significant treatment of the question whether the board in its day-to-day operations and in its planning has been responsive to the "particularized needs" of black residents or black parents or black children. The court concluded on the basis of its understanding of the separate desegregation lawsuit that the Board had been guilty of "dilatory practices." (J.A. 37a.) It also reasoned that because the Board continues to operate under the "watchful eye of the court" in that action, the Board "cannot justly claim credit for the improvement of the school system today." (J.A. 37a-38a.)

The district court cited and quoted from eight specific opinions or orders in this separate desegregation lawsuit, the latest of which is in *1970.* (J.A. 15a-20a.) It made no effort to explain how these materials could possibly support its conclusion that the Mobile County school board "has not [been], and *is not,* responsive to blacks on an equal basis with whites." (J.A. 37a; emphasis added.)

In short, the district court's findings on this point do not advance analysis at all. The fact is that, on the record, there is no persuasive evidence of unresponsiveness.

C. The District Court's Conclusion That The State Policy Underlying The At-Large Election Of Mobile County School Board Members Is "Neutral" Was Premised Upon A Misreading Of The Purpose Of This Factor And Is Inconsistent With The Basic Facts Found By The District Court.

If any fact was not seriously disputed below, it was the long-standing and continuous commitment by the people of Mobile County and the State of Alabama to the at-large election of the members of the governing body of

the Mobile County public schools. This fact was reflected in the following basic facts found by the district court and not substantially disputed by plaintiffs:

> (1) The at-large system of electing the members of the governing body of the Mobile County public schools began with the creation of this body in 1826, several years after Alabama was admitted to the Union. (J.A. 20a.)[23]
>
> (2) From the beginning Mobile County's public school system, including the at-large manner of electing the members of its governing body, has been accorded a unique status by the Alabama legislature. Thus, the first general public school system in Alabama was not established until 1854, 28 years after creation of the Mobile County public school system. Further, even in this 1854 Act the Alabama legislature specifically "recognized and maintained the Mobile County schools separate and apart from the school system for the State." (*Id.*) The special status of the Mobile County public school system has been continued, as evidenced in Section 270 of Article XIV of the Alabama State Constitution, which has been construed to insulate the Mobile County public school system from legislative acts of general application. (J.A. 10a.)
>
> (3) Although there have been numerous actions by the Alabama legislature dealing with or affecting the Mobile County public schools since 1826, there has been no change in the at-large manner of electing the Mobile County school commissioners. (J.A. 20a.) These legislative changes have included separate acts in 1854, 1875, 1876, 1901 and 1919. Throughout this period of a century and a half, the State of Alabama has continued to provide for the at-large election of members of the governing body of the Mobile County public schools.[24]

[23] Although there is some ambiguity in the language of this 1826 Act on the manner of electing these members, it is clear that at least by 1836 the members were to be elected on an at-large basis. (Pp. 7-8 & n.5, *supra.*)

In short, there was abundant evidence, and no real dispute, that, as the district court found, "[t]he manifest policy of Mobile County has been to have at-large or multi-member districting." (J.A. 20a.) That there are good reasons, racially neutral, for such a commitment to at-large elections is demonstrated in a subsequent section of our argument. (See pp. 64-69, *infra.*)

Nevertheless, the district court concluded that this *Zimmer* factor was "neutral," because of its conclusion that there is "no clear cut *State* policy either for or against multi-member districting or at-large elections in the State of Alabama, considered as a whole." (J.A. 20a; emphasis in original.) The evident assumption underlying the district court's conclusion—which was not supported by any specific facts or discussion—was that the state policy "considered as a whole" should govern.

That assumption is inconsistent with the apparent purpose of this *Zimmer* factor, which is to assess whether the particular at-large election system being challenged reflects a substantial state interest. In the case of a challenge to a state-wide apportionment scheme, as was involved in *White* v. *Regester,* or even to a state-wide

[24] Following the filing of the present lawsuit, in the summer of 1975 the Alabama legislature did enact legislation reapportioning the Mobile County school board into separate single-member districts. However, an Alabama state court declared that this legislative action was defective because of the manner in which notice of the legislation was published. (J.A. 23a.)

policy, as was involved in *Zimmer* v. *McKeithen* itself, it may well be appropriate to focus on the policy of the state "considered as a whole." But such a focus is illogical when the question is the state's commitment to at-large elections for the members of a single local entity such as the Mobile County school board. There is simply no reason why the "manifest policy" underlying the at-large election of this governing body should have been ignored because in other contexts the state has adopted different election procedures.[25]

III. JUDGED BY PROPER STANDARDS, THE AT-LARGE ELECTION OF MOBILE COUNTY SCHOOL COMMISSIONERS IS NOT UNCONSTITUTIONAL.

The judgment below is wrong if taken on its own terms. The *Zimmer* factors are not the appropriate criteria for judgment, and they were in any event not satisfied. So we have shown in the foregoing sections of the brief. In this section we show that under a correct construction of the Constitution the at-large manner of electing Mobile County school commissioners violates neither the Fourteenth nor the Fifteenth Amendment. Specifically, we show that under the standards for decision that have been established by this Court, plaintiffs must prove either

1. that the at-large plan was conceived as a purposeful device to discriminate against black voters and political candidates in Mobile County; or

[25] Indeed, if the "local component" of the state policy were reversed—if, for example, the state abruptly switched to an at-large system of electing school board members for a particular "County X" in a situation where black voters shifted from being a voting majority to be a voting minority in the County—it is difficult to imagine that the district court or the court of appeals would—or should—adopt the same view of the "neutrality" of state policy "considered as a whole." *Cf.* Stewart v. Waller, 404 F. Supp. 206 (N.D. Miss. 1975) (*per curiam*) (three judge court), discussed at p. 61 n. 29, *infra*.

2. that black voters and candidates in Mobile County are being deliberately excluded from the political process, and that the division of the County into single-member school-commissioner districts is necessary to remedy this exclusion.

We next show that plaintiffs have neither alleged nor proved that at-large voting for Mobile school commissioners was devised with the intent to discriminate against blacks and have not proved that blacks are excluded from the Mobile County political process. Indeed, the record affirmatively establishes that the opposite is true in each instance. Finally, we note that plaintiffs' case falls especially short because this Court's standards of decision have been developed in the context of state legislative multi-member districts, and this case deals with a single municipal body, as to which the policy considerations favoring at-large elections are stronger and the potential disadvantages weaker than in the case of state legislative districting.

A. To Establish That An At-Large System Of Elections Is Unconstitutional, Plaintiffs Must Prove Discriminatory Intent Or Exclusion From The Political Process.

The issue of the constitutionality of multi-member districts has frequently been presented to the Court. Although the Court has reflected its awareness of the vigorous debate in the social science literature about the claimed advantages and disadvantages of multi-member districts, including their possible effects on the voting

strengths of minority populations,[26] it has squarely held that such districts are not *per se* illegal under the Constitution. *See, e.g., Kilgarlin* v. *Hill,* 386 U.S. 120 (1967); *Burns* v. *Richardson,* 384 U.S. 73 (1966); *Fortson* v. *Dorsey,* 379 U.S. 433 (1965). Indeed, although in *Lucas* v. *Colorado General Assembly,* 377 U.S. 713 (1964), decided the same day as *Reynolds* v. *Sims,* 377 U.S. 533 (1964), the Court noted certain undesirable features of multi-member districts, it expressly declined to say "that apportionment schemes which provide for the at-large election of a number of legislators from a county, or any political subdivision, are constitutionally defective." 377 U.S. at 731 n.21.

Whitcomb v. *Chavis,* 403 U.S. 124 (1971), contains the Court's most extended discussion of the constitutional implications of multi-member districts. *Whitcomb* involved at-large elections in Marion County, Indiana. The Court held that plaintiffs' case did not fall within the ambit of previous cases such as *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960), inasmuch as "there is no suggestion here that Marion County's multi-member district, or similar districts throughout the State, were conceived or operated as purposeful devices to further racial or economic discrimination." 403 U.S. at 149. The Court next held that

[26] The debate continues to rage but, as Professor Eugene Lee and Jonathan Rothman note in their recent article, *San Francisco's District System Alters Electoral Politics,* 67 Nat'l Civic Rev. 173 (1978), the evidence on either side is scant.

> "America's large cities (the 24 with a population of more than 500,000 in 1975) are nearly evenly divided among those using the district system, the at-large system or some combination of the two. Yet too little is known about the way in which citizens choose their urban leaders, in particular about the implications of at-large versus district elections. A review of the meagre and generally dated literature on the subject reveals an abundance of conventional wisdom and a lack of empirical evidence."

the fact that racial minorities appeared unable to elect members of the same minority to the state legislature did *not* "satisfactorily prove invidious discrimination absent evidence and findings that ghetto residents had less opportunity than did other Marion County residents to participate in the political processes and to elect legislators of their choice." *Id.* The Court concluded:

> "The mere fact that one interest group or another concerned with the outcome of Marion County elections has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political system." *Id.* at 154-55.

White v. *Regester,* 412 U.S. 755 (1973), is the only decision of the Court in which a constitutional challenge to multi-member districts has been sustained.[27] It follows strictly the teaching of *Whitcomb* v. *Chavis.* In *White* v. *Regester* the Court upheld the "intensely local appraisal" by the district court "of the design and impact" of the multi-member districts in two Texas counties. 412 U.S. at 769. The district court had concluded that the multi-member districts fashioned for Dallas and Bexar counties were unconstitutional as "invidiously discriminatory" against blacks (in Dallas County) and against Mexican-Americans (in Bexar County). *Id.* at 765-70.

The Court emphasized at the outset that "[p]lainly, under our cases, multimember districts are not *per se*

[27] Although the Court has noted that multi-member districts are a disfavored remedy when directed by a court in a reapportionment case, *see, e.g.,* Connor v. Johnson, 402 U.S. 690 (1971), the Court has consistently emphasized that the same standards do not apply when it reviews electoral systems devised by state legislatures, *see* Chapman v. Meier, 420 U.S. 1, 18-19 (1975).

unconstitutional . . . ." *Id.* at 765. It continued, building on the suggestion in *Whitcomb* v. *Chavis* that breaking up multi-member districts might be necessary as a remedy for a more fundamental deliberate exclusion of minority groups from the political process:

> "But we have entertained claims that multi-member districts are being used invidiously to cancel out or minimize the voting strength of racial groups . . . . To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice. *Whitcomb* v. *Chavis, supra* at 149-50." *Id.* at 765-66 (citations omitted).

Thus, under *Whitcomb* v. *Chavis* and *White* v. *Regester,* there are two bases on which an at-large system of elections may be set aside by a federal court. First, the system can be found to be the product of purposeful discrimination. If so, under the teaching of *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960), and other cases, the at-large system is unconstitutional.[28] An example of such unconstitutionality is the at-large system of municipal

[28] Thus, in *Whitcomb,* the Court, after citing its decision in Gomillion v. Lightfoot, 364 U.S. 339 (1960), emphasized that "there is no suggestion here that Marion County's multi-member district . . . [was] conceived or operated as [a] purposeful device[ ] to further racial or economic discrimination." 403 U.S. at 149.

elections decreed by the Mississippi legislature in 1962, found by the court in *Stewart* v. *Waller,* 404 F. Supp. 206 (N.D. Miss. 1975) (*per curiam*) (three judge court), to be illegally racially motivated. (See p. 61 & n.29, *infra.*) But *Whitcomb* and *White* make clear that a discriminatory intent may not be inferred from the mere inability of minorities to elect representatives in proportion to their number in the population. *See also United Jewish Organizations* v. *Carey,* 430 U.S. 144, 166-67 (1977).

The other basis established by *Whitcomb* and *White* for ordering a multi-member district broken up into single-member districts is as a remedy for the unconstitutional exclusion of a minority from "the political processes leading to nomination and election . . . ." *White* v. *Regester, supra* at 766, citing *Whitcomb v. Chavis, supra* at 149-50. The creation of single-member districts in one or more of which the complainant minority is likely to preponderate in numbers is an effective remedy for the minority's exclusion from slating and other aspects of the political process. Once the minority vote is extracted from the pool of other votes that has diluted its strength, minority interests and minority candidates can no longer be ignored, at least in those newly-created districts in which the minority voting power preponderates—and especially if racially polarized voting is characteristic of the jurisdiction. But the necessary predicate for such a remedial order is a finding that the minority has been excluded from the political process. *See* Casper, *Apportionment and the Right to Vote,* 1973 S. Ct. Rev. 1, 24-29. If there is no such exclusion in the first instance—if minority candidates are able freely to put themselves forward for election even though with indifferent success because of the "unfortunate practice" of voting according to a candidate's race—there is no constitutional

wrong to be remedied, "[h]owever disagreeable this result may be . . . ." *United Jewish Organizations* v. *Carey, supra* at 166-67.

When these proper standards are applied to the record in this case, it becomes apparent that there is no basis for a finding that Mobile County's method of electing school commissioners is unconstitutional.

B. There Is No Basis In The Record For A Conclusion That Mobile County's At-Large System Of Elections Should Be Dismantled For Constitutional Reasons.

1. The courts below could not possibly find that plaintiffs have shown that Alabama's commitment to at-large elections for Mobile County school board members was conceived as a purposeful device to discriminate against black residents or voters.

The argument on this point can be brief. Simply put, there is no basis from which the district court could have found (even if the plaintiffs had alleged) that the century-and-a-half commitment of the State of Alabama to the at-large election of the governing body of the Mobile County public schools was conceived in racial animus. The relevant facts are recited above. In summary:

The decision that the Mobile County school commissioners should be elected from the County at large was made in the early part of the nineteenth century when such a decision could not have been influenced by any intention to prevent blacks from being elected to the board. This point was made by plaintiffs' own witness, Dr. McLaurin, the history professor. Dr. McLaurin testified, it will be recalled (pp. 9-10, *supra*), that (1)

blacks were completely excluded from the Alabama political system until at least 1865, (2) accordingly, until 1865 it would have been unnecessary for the Alabama legislature to establish any particular method of electing the governing body of the Mobile County public school system to exclude the possibility that blacks would be elected, and (3) indeed, such a possibility would not even have occurred to the people of Mobile County or of Alabama.

The current statute providing for at-large elections dates from 1919 (or 1933 or 1939), maintains a policy that has prevailed since at least 1836 and was enacted under the authority of a constitution that, as Dr. McLaurin explained, from its adoption in 1901 through at least 1944 effectively excluded blacks from any involvement in Alabama political life. Dr. McLaurin added that during this period it would have been unnecessary for Alabama to adopt any particular election system to prevent blacks from being elected to the Mobile school board, and even the possibility that blacks might someday be able to vote would not have been a major motivating factor in any legislative action. (P. 10, *supra.*)

In short, the testimony of plaintiffs' own witness belies any possible claim that Alabama's commitment for a century and a half to the at-large election of the governing body of the Mobile County school system was motivated by a purpose or intention to discriminate against blacks. This case has nothing in common with *Stewart* v. *Waller,* 404 F. Supp. 206 (N.D. Miss. 1975) (*per curiam*) (three judge court), where a racial purpose was found in at-large municipal election legislation. [29]

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[29] At issue in *Stewart* v. *Waller* was a 1962 Mississippi enactment requiring for the first time that all aldermen in all Mississippi municipalities, irrespective of their population, be elected on an at-large basis. This was a fundamental departure in state election law.

(footnote continued)

2. The courts below could not possibly find plaintiffs to have demonstrated that blacks were "excluded" from or denied equal access to the political process of electing Mobile County school commissioners.

There is no basis in the record from which the district court could conceivably have found that blacks have been "excluded" from or denied "equal access" to the political process leading to the election of Mobile County school board members.

We have detailed above the errors that the district court made in applying the *Zimmer* factors, and to a large extent that discussion anticipates the discussion at this point. (Pp. 46-50, *supra.*) The district court's basic error was in implicitly assuming that its finding that blacks were "discouraged" or "shied away" from at-large elections in Mobile County could support its conclusion that blacks were denied "equal access" to the slating or candidate selection process. As indicated above, the district court's opinion itself makes it clear that any such discouragement was not the result of any formal or informal barriers to becoming a candidate or enlisting support but rather resulted from racially polarized voting combined with the numerical minority—estimated at 24 percent—of blacks in the voting population of Mobile County as a whole. Thus, the district court in substance found merely a

(footnote continued)
404 F. Supp. at 210. Prior to 1962, cities of over 10,000 population were required to elect six of seven aldermen by individual wards, and smaller municipalities had been given discretion to use this modified ward system. *Id.* at 209. The district court found that the shift to at-large elections was manifestly motivated by discriminatory motives—the legislation's author had urged its passage on the ground that it was "needed to maintain our southern way of life"—and that the defendants had "offered no alternative nonracial explanation" for the legislation. *Id.* at 214.

minority and voting polarization—the starting point for analysis in a voting power dilution case, as we have said, not the end point.

Once the misconception that "discouragement" arising from electoral defeats amounts to a denial of "equal access" to the political process is cleared away, one is bound to conclude from the district court's findings themselves that blacks were not denied equal access to the political process relating to election to the Mobile County school board. The district court, it bears repeating, found that:

> 1. "There are no formal prohibitions against blacks seeking office in Mobile County." (J.A. 12a.)
>
> 2. "[B]lacks register and vote without hindrance." (*Id.*)
>
> 3. "The election of the school commissioners is partisan and black[s] and whites participate in both parties." (*Id.*)
>
> 4. "Any person interested in running for school commissioner is able to do so." (J.A. 36a.)

These specific findings are supported by the record. Contrary findings would not be. There is therefore no basis in the record from which the district court could have found that black voters or black potential candidates were denied equal access to the political process in any sense of this concept that could underlie a finding of a constitutional deprivation.

C. The Standards Against Which Claims Of Unconstitutional Dilution Of Voting Power Are To Be Tested Should Be Even More Rigorous In This Case, Involving As It Does A Single Local Body Rather Than A Multi-Member Legislative District.

The relevant constitutional standards established by this Court have been developed in cases involving the constitutionality of multi-member districts from which members of statewide legislative bodies were elected. As noted by four Justices specially concurring last term in *Wise* v. *Lipscomb*, 98 S.Ct. 2493, 2502 (1978):

> "While this Court has found that the use of multimember districts in a state legislative apportionment plan may be invalid if 'used invidiously to cancel out or minimize the voting strength of racial groups,' *White* v. *Regester*, 412 U.S. 755 (1973), we have never had occasion to consider whether an analogue of this highly amorphous theory may be applied to municipal governments."

That such an analogue may be applied to a municipal entity such as a school board was assumed by the parties and the tribunals below, and the question whether that application was appropriate was not presented in the jurisdictional statement. As has been demonstrated by all the foregoing discussion, a negative answer to the question is not necessary to compel a reversal of the judgment in this case because the theory or its analogue was in any event misapplied. We think it appropriate, nevertheless, to point out some of the considerations that give special weight to a legislative judgment that a local governing body should be elected at large and that we therefore believe justify an especially rigorous application of the

White v. *Regester* and *Whitcomb* v. *Chavis* standards of decision in a case concerning such a body.

The district court in the *Wise* case itself, upholding the at-large election of Dallas city council members, emphasized the reasons why such electoral schemes are of particular importance in the context of a local government:

> "There is . . . [a] need for a city-wide view on the part of council. The council has responsibility for policies which affect the city as a whole, as well as those which affect specific geographic and demographic parts. Several members of the present council and the present City Manager presented the view that having some members of the City Council elected on a city-wide basis would be desirable." *Lipscomb* v. *Wise*, 399 F. Supp. 782, 794 (N.D. Tex. 1975).

The district court's findings were based in part on this Court's caution in *Chapman* v. *Meier*, 420 U.S. 1, 20 n.14 (1975), that "multimember districts may insure that certain interests such as city-or region-wide views are represented," citing Carpeneti, *Legislative Apportionment: Multimember Districts and Fair Representation*, 120 U. Pa. L. Rev. 666, 695-96 (1972). Indeed, there are many suggestions in this Court's opinions that methods of electing the members of local governmental bodies are not indiscriminately to be judged by criteria applicable to state-wide elections:

> —Earlier this Term in *Holt Civic Club* v. *City of Tuscaloosa*, No. 77-515, Nov. 28, 1978, slip op. at 11, this Court recognized the "extraordinarily wide latitude that states have in creating various types of political subdivisions

and conferring authority upon them" in rejecting an equal protection challenge to an Alabama statute subjecting residents located within three miles of Tuscaloosa's corporate limits to various regulations without grant of a concomitant voting franchise.

—In *Abate* v. *Mundt,* 403 U.S. 182, 185 (1971), the Court held that "slightly greater percentage deviations may be tolerable for local government apportionment schemes," reflecting in part the view that local governing bodies perform different functions and have a different relationship to their constituencies than state or federal legislatures. *See also* Note, *Supreme Court 1970 Term,* 85 Harv. L. Rev. 3, 148-49 (1971).

—In *Avery* v. *Midland County,* 390 U.S. 474, 485 (1968), the Court stated its awareness "of the immense pressures facing units of local government, and of the greatly varying problems with which they must deal. The Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems."

—In *Sailors* v. *Board of Education,* 387 U.S. 105, 110-11 (1967), the Court emphasized the unique problems of local governments, stating that "[v]iable local governments may need . . . great flexibility in municipal arrangements to meet changing urban conditions." *See also Dusch* v. *Davis,* 387 U.S. 112, 116-17

(1967) (local governments are faced with the "complex problems of the modern megalopolis . . . .")

At-large election of members of local government bodies requires each member to be sensitive to the needs of the entire community; the member is answerable not to the parochial concerns of the residents of a particular geographic district but to the needs of the larger community. Such a broader view of the constituency is particularly appropriate for members of a school board, whose judgment should be guided by general concerns for the promotion of good educational standards, not the narrow views of a particular district.

The Court noted in *Fortson* v. *Dorsey,* 379 U.S. 433, 437-38 (1965), the importance of the "practical realities of representation in a multi-member constituency," speaking there, to be sure, of a state senator elected at large:

> "[S]ince his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of people in his home district; thus in fact he is the county's and not merely the district's senator." *Id.* at 438.

See also Dallas County v. *Reese,* 421 U.S. 477, 479-80 (1975) *(per curiam); Dusch* v. *Davis, supra* at 116-17.

The "practical realities" emphasized in *Fortson* concerned state-wide electoral office; those realities become more important when we deal with local governing bodies where, as the Court is aware, direct public involvement in decision-making is often greater, communication between elected officials and citizen groups is often active and

open, and the governmental functions served involve the day-to-day concerns of the community.[30]

Moreover, the use of at-large elections for local officials generally involves quite different considerations from the use of similar systems in elections of state legislators. All citizens within a district are treated alike, there is no crazyquilt pattern of some citizens voting only in single-member districts and others voting at-large. And, once elected, the members of local governing bodies must work together in administering the affairs of their communities, unlike the role of state legislators who function in structured majority/minority party blocs, voting on individual pieces of legislation. Indeed, some local governmental units, such as school boards, serve principally administrative functions. What they do has little or nothing in common with what goes on in the legislative chambers and hearing rooms of the statehouse.[31]

[30] Thus, in both Cantwell v. Hudnut, 566 F.2d 30, 37-38 (7th Cir. 1977), *petition for cert. filed,* No. 77-1615, May 12, 1978, and Wallace v. House, 515 F.2d 619, 633 (5th Cir. 1975), *vacated and remanded on other grounds,* 425 U.S. 947 (1976), the courts emphasized the unique problems of local governing bodies and the value of at-large elections to reflect the views of the entire constituency.

[31] The use of at-large elections together with the introduction of a council-manager form of city government was widely regarded as a needed reform in urban government around the turn of the century, to reduce partisanship in municipal governance and to promote city-wide attitudes on the part of elected officials. *See* E. Banfield and J. Wilson, *City Politics* 151 (1963); Karnig, *Black Representation on City Councils: The Impact of District Elections and Socioeconomic Factors,* 12 Urb. Aff. Q. 223 (1976); Neighbor, *The Case Against Nonpartisanship: A Challenge from the Courts,* 66 Nat'l Civic Rev. 448 (1977). As Professor Rehfuss concluded, "[m]unicipal reformers in the United States contend that the council manager form of government works best when citywide rather than ward elections are used to select councilmen." Rehfuss, *Are At-Large Elections Best For Council-Manager Cities?* 61 Nat'l Civic Rev. 236 (1972).

(footnote continued)

At any rate a state legislature may reasonably and legitimately have weighed considerations such as these when it chose to provide for at-large municipal elections. The rationality of such a choice of at-large elections for municipal officials should count heavily in any judgment of its constitutionality.

CONCLUSION

The judgment below should be reversed. The errors of the district court and the court of appeals are palpable. They mistook the standards that governed decision, and they misapplied the standards that they mistakenly invoked. If proper constitutional standards are properly applied, the plaintiffs have no case. The at-large manner of electing the commissioners of the Mobile County school system is constitutional. It does not operate to deny black citizens of Mobile County the equal protection of the laws or deny or abridge their right to vote on account of their race or color. The record is full, and it shows that the century-and-a-half commitment of Mobile County to at-large school board elections is racially neutral and that blacks are not impeded in seeking school board positions and other Mobile County political offices. There is no occasion for any further proceedings on the merits. Upon reversal the case should be remanded to the district court

(footnote continued)

One of the more recent attempts to tabulate the number of city governments using at-large elections (based on 1972 data) concluded that 70% of cities conducting non-partisan elections use at-large elections; and almost half of all partisan elections held in cities larger than 10,000 are at-large. *See* Svara, *Unwrapping Institutional Packages in Urban Government: The Combination of Election Institutions In American Cities,* 39 J. Pol. 166, 168 (1977). Professor Svara found that 63% of all cities in the United States with a population greater than 10,000 used at-large elections, which he described as part of the "good government reform model" of city government.

with instructions to withdraw the remedial order it has entered and to take appropriate steps to undo what has already been done in furtherance of that order and thereby to reconstitute as promptly as possible a school board whose members are elected from Mobile County at large pursuant to the governing state statutes.

Respectfully submitted,

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December 1978

ADDENDUM

Act No. 229, Local Acts, 1919, of the State of Alabama, approved August 22, 1919

AN ACT

To further regulate the public school system of the county of Mobile by establishing a Board of School Commissioners for Mobile County, of five members, in the place and stead of the Board of School Commissioners of Mobile County, as at present constituted; which new board of five members shall have the same title and exercise the same rights, powers, duties and privileges as are now had and exercised by the Board of School Commissioners of Mobile County as at present constituted; and, to that end, to abolish the Board of School Commissioners of Mobile County as now constituted.

SECTION 1. ***Be it enacted by the Legislature of Alabama,*** That the Board of School Commissioners of Mobile County as now constituted and existing is hereby abolished.

SECTION 2. Be it further enacted that the Superintendent of Education of the State of Alabama, is hereby required to appoint as the members of the Board of School Commissioners of Mobile County which shall exist under this Act, five persons out of and from the Board of nine members as at present constituted. This said Superintendent of Education of the State of Alabama shall so appoint the members of the Board of School Commissioners to hold office under this act, as soon as is reasonably practicable after this Act shall have become law. Until the Superintendent of Education of the State of Alabama, shall have so appointed the new Board herein provided

for, the old Board of School Commissioners of Mobile County, being the Board as at present constituted, shall continue to hold office and administer the public school system in Mobile County.

SECTION 3. Be it further enacted that the Superintendent of Education of the State of Alabama shall make known his appointment of the five members who shall constitute the Board of School Commissioners of Mobile County under this Act, by a notice in writing to each of the five members and also by a formal proclamation addressed to the Board of School Commissioners of Mobile County. At once upon the giving, by the said Superintendent of Education of such notices, and the promulgation of such formal proclamation, the Board of School Commissioners of Mobile County, as at present constituted, shall forthwith cease to exist and the new Board of School Commissioners of Mobile County, under this Act, shall forthwith come into being.

SECTION 4. Be it further enacted that in appointing the five members of the Board of School Commissioners of Mobile County under this Act, here-in-before provided for, the Superintendent of Education of the State of Alabama, shall divide the said five members into three classes which shall be styled Class 1, Class 2, and Class 3, Class 1 shall consist of two members, Class 2 shall consit [sic] of two members and Class 3 shall consist of one member. The members in Class 1 shall hold office until the general election in 1920, and until their successors shall have been elected and qualified. The term of office of their successsors shall be six years. The members in Class 2 shall hold office until the general election in 1922 and until their successors are elected and qualified. The term of office of their successors shall be six years. The member in Class 3 shall hold office until the general

election in 1924 and until his successor shall be elected and qualified. The term of office of his successor shall be six years. So in every second year thereafter, at the general election in that year, there shall be elected by the people successors to the members of the Class whose term of office is then expiring. The term of office of the Commissioners elected by the people at the general elections under this Act, shall be six years.

SECTION 5. At the general election in 1920 the successors to the two members of Class one, and at the general election in 1922 the successors to the two members of Class two, and at the general election in 1924, the successors to the one member of Class three, shall be elected by the voters of the county at large.

SECTION 6. Be it further enacted that the Board of School Commissioners of Mobile County as established under and by this Act shall have the same title as the present Board to-wit, Board of School Commissioners of Mobile County, and shall have and exercise all the rights, powers, duties and privileges that are now held and exercised by the Board of School Commissioners of Mobile County as now constituted, the whole purpose of this Act being the creating, of a Board containing five members in lieu of a Board containing nine members, and otherwise not to disturb or in any way affect the body of existing law regulating and governing the system and conduct of public schools in Mobile County, except as expressly set out in this Act as necessary to make harmonious the present Act with the said body of the existing law.

SECTION 7. Be it further enacted, that three members shall constitute a quorum at any meeting of the Board of School Commissioners established by and under this Act, whether such meeting be a special, general or regular

meeting, and any and all acts taken by a quorum in the name of the Board, shall be valid and binding as fully as if taken at a meeting having present the entire membership; provided, however, that no business involving a change in the system, rules or regulations or affecting the general interest of the county shall be transacted except at the regular meeting after due notice given, or when a full Board is in attendance; and provided further that the provisions of already existing law, requiring unanimous action of the Board, or action by the full Board, in certain stated contingencies, are not by this Act changed or altered but remain in full force and effect.

SECTION 8. Be it further enacted that all laws and parts of laws in conflict herewith are hereby expressly repealed.

Approved August 22, 1919.